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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1721.

UNITED STATES OF AMERICA,
PETITIONER,

v.

JOSEPH A. CHADWICK ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Respondents.

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Brief for the Respondents.

Question Presented.

Whether the warrant requirement should be abolished for all searches of personal effects outside the home even if the effects are contained in a securely locked, opaque footlocker, "kept private and away from prying eyes," and no exception or exigency compels swift police action?

Statement of the Case.

Prior Proceedings.

Respondents Chadwick, Machado and Leary were arrested on May 10, 1973, and were subsequently charged on November 2, 1973, with possession of marijuana with intent to distribute and conspiracy in violation of 21 U.S.C. §§ 841(a)(1) and 846. Prior to trial, respondents challenged the validity of Chadwick's arrest as lacking in probable cause and moved to suppress the fruits of a warrantless search of certain luggage (a large footlocker and two small suitcases), a body search of Chadwick's person and certain remarks made by Chadwick in the immediate aftermath of his arrest.

After an evidentiary hearing held on September 5, 1974, the district court made findings of fact and rulings favorable to respondents on all issues and suppressed all of the challenged evidence (Pet. App. 32a-51a). The government then moved for reconsideration, and a second evidentiary hearing was held on March 6, 1975. The result of the reconsideration was that the district court amplified its previous rulings and reaffirmed its decision to suppress (*id.*, 52a-63a). The government appealed and on March 29, 1976, the court of appeals rendered a decision upholding the determinations of the district court on all issues (Pet. App. 1a-31a).

On May 26, 1976, the government filed a petition for a writ of certiorari. It limited its petition, however, to only one aspect of the case — the decision to suppress the marijuana seized from the large footlocker — and raised no questions concerning the lower courts' suppression of Chadwick's post-arrest statements and of the marijuana seized from Chadwick's person and from the two small suitcases which were also searched without a warrant. On October 4, 1976, the writ was granted on the single issue raised.

The Evidence With Respect To The Luggage Searches.

Both opinions of the district court (Pet. App. 32a-51a, 52a-63a) and the opinion of the court of appeals (*id.*, 1a-32a) contain extensive summaries of the evidence adduced at the two hearings. The key facts pertinent to the footlocker search are these:

On May 8, 1973, federal narcotics agents in Boston received "reliable information" from their counterparts in San Diego, California, that an Amtrak passenger had loaded a 200-pound footlocker "suspected of containing marijuana" on a train bound for Boston (Pet. App. 34a; see *id.*, 2a). The shipper, Machado, had booked passage for two to Boston (*id.*), and the destination address of the footlocker was his residence in Scituate, Massachusetts, a small town near Boston (A. 15). The tip had come from an Amtrak official who had observed that Machado matched a profile used by the railroad to spot drug traffickers, that the footlocker was leaking talcum powder (a substance commonly used to mask the odor of marijuana (A. 15)), and that the footlocker had an "unusual weight for its size" (Pet. App. 2a-3a, 34a). Along with this information, relatively detailed descriptions of the footlocker and of Machado were relayed to the agents in Boston (Pet. App. 3a, 34a; A. 15, 17).

The train was due to arrive at South Station, Boston, two and a half days later, at 7:50 p.m., May 10th. Between May 8th and May 10th the Boston agents "sought no search or arrest warrants, but continued investigating" (Pet. App. 3a). When the train stopped at New Haven, Connecticut, several hours prior to its Boston arrival, Amtrak officials verified that the footlocker was still aboard, and conveyed this information to the Boston agents (Pet. App. 3a, 34a). The agents determined that "the suspicion was sufficient to justify an expenditure of men and energy at South Station" and accordingly six law enforcement officers, as well as a

"detector dog" trained to "alert" to marijuana and its handler, were gathered at the station an hour before the train's scheduled arrival (Pet. App. 3a).

After the train's hour-late arrival, the agents identified a debarking passenger fitting Machado's description and observed him and his travelling companion (a woman later identified as Leary) "take possession of an old brown footlocker and two suitcases" (Pet. App. 35a). Machado and Leary took the footlocker from the baggage cart which had been used to transport the 200-pound piece of baggage from the train to the station area, "placed it on the floor . . . and sat down on it" (Pet. App. 3a). A few minutes later, the dog was released near the footlocker and "started scratching on it and giving what is considered a response or alert response to the controlled substance" (A. 49). The agents never observed the footlocker open (Pet. App. 3a).

Shortly thereafter, Chadwick arrived and after a brief conversation with Machado and Leary left the terminal and went outside to a parked automobile (Pet. App. 4a). "Machado and Leary engaged a redcap who physically transported the footlocker out to the car" where Chadwick was waiting (Pet. App. 4a). Leary, taking one of the two suitcases with her, entered the front seat of the parked automobile (Pet. App. 4a, 53a). The redcap, with the help of Machado and Chadwick, loaded the footlocker and one of the suitcases into the trunk of the car (Pet. App. 4a, 53a).

Then, "before the trunk lid was closed or the car engine started, the federal agents closed in and arrested the trio" (Pet. App. 5a). Chadwick and Machado were seized near the rear of the automobile, Leary while seated in the front seat (Pet. App. 5a). "There were numerous officers present, including city policemen, railroad guards and federal agents" (Pet. App. 50a). The arresting officers had at least one gun drawn and within "less than 30" seconds (A. 39) the three respondents were "frisked . . . put up against the car" and "handcuffed" (A. 39-40). Chadwick

and Machado were then placed in one government vehicle, Leary in another, and the agents took possession of the automobile and the luggage (Pet. App. 5a). No guns or weapons were found on any of the respondents (Pet. App. 5a); no accomplices were suspected or believed to be in the area (Pet. App. 50a); and immediately after the arrest the keys to the footlocker were taken from Machado's person (*id.*, 5a, 35a-36a, 50a).[1] As the government conceded in testimony, the footlocker was, from the moment of the arrest, under the agents' "control at all times" (*id.*, 5a; see 35a-36a, 50a).

The luggage was taken to the agents' office in the federal building in Boston. The footlocker had a "double locking system" (A. 41) — "a padlock over the regular trunk latch" (*id.*) — and both suitcases were also locked (Pet. App. 7a-8a). According to government testimony, "there was no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates" (A. 44). Nor was there any "suspicion" that the luggage contained explosives (see A. 77). Furthermore, facilities were available at the agents' office in which locked luggage could have been stored securely for a period of time (see *id.*). Against this backdrop, approximately one and a half hours after the arrests, the federal agents — acting without consent and without search warrants — entered the locked luggage (Pet. App. 7a-8a). The two locks on the footlocker were opened with the keys which had been previously seized from Machado; the two suitcases were broken open forcibly (Pet. App. 8a, 53a). Substantial amounts of marijuana were found inside each piece of luggage (Pet. App. 8a).

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[1] Contrary to the government's assertion at Government Brief 4, (hereinafter "GB"), no marijuana was found on Chadwick at that time. It was a later search of Chadwick's person, which occurred after Chadwick had been taken to the federal building, which produced a small quantity of marijuana (Pet. App. 7a, 36a).

It is conceded that the agents made no efforts to obtain warrants to search the luggage (see A. 44; Pet. App. 8a, 36a). Nor did the government offer any evidence to suggest that any haste was necessary or even that the agents might have been inconvenienced in the slightest by compliance with the warrant requirement before entering the locked luggage. Indeed, the district court noted that "the arrest took place within 10 blocks of the federal courthouse past which the agents traveled on their way to [the federal building, a five minute trip from the station (Pet. App. 5a)] where the actual search took place" (Pet. App. 50a).

Decisions of the Lower Courts.

At each previous stage of this case — the hearing on the motion to suppress, the reconsideration of that motion, and the appeal — the government took an entirely different position with respect to the luggage searches. Accordingly, at each stage, the lower court was asked by the government, and answered, a different set of questions.

Stage 1: In its original opposition to respondents' motion to suppress, the government relied "exclusively" on one theory — the "automobile exception" — to justify the warrantless searches of all three pieces of luggage (Pet. App. 33a, n. 1, 46a, 54a). It argued that because the luggage had been placed in a parked automobile just prior to the seizure, the "automobile exception" immunized the agents from their Fourth Amendment duty to obtain a search warrant (*id.*, 9a, 46a, 51a). The district court, finding that "there was no nexus between the search and the automobile" — and no "danger that if the warrantless search were not permitted, [the] contraband might well disappear" (Pet. App. 48a) — rejected the government's theory (*id.*, 48a-49a). The district court also found that no exigency existed to justify the government's neglect to obtain a warrant, and that no other exception to the warrant requirement was applicable (*id.*, 50a-51a).

Stage 2: Upon petitioning the district court for reconsideration the government tried an entirely new approach. It separated the question of the suitcases from that of the footlocker and argued that, as to the footlocker, the search was justified as incident to the arrests (*id.*, 10a, 54a), while, as to the suitcases, the "breaking open" was not really a "search" at all but was done merely to "inventory" their contents (*id.*, 20a, 57a). The district court rejected both theories: the footlocker, it found, "as a matter of fact, practicality and law . . . was simply not within the control of the defendants at the time of arrest" (*id.*, 56a) and the "breaking into the suitcases" could not be justified as a routine "inventory search" (*id.*, 58a-59a).[1]

Stage 3: The court of appeals reviewed and upheld each of the answers given by the district court. It agreed that the "automobile exception" could not control since, under the circumstances of this case, "the floor of the automobile was nothing more than a platform or resting place for the footlocker" (Pet. App. 10a). It also agreed that the search of the footlocker could not be justified as an incident to the arrests of the respondents, stating:

> "It is difficult to liken this footlocker to a hand-carried bag and say in any meaningful sense that the footlocker or, more importantly, its contents, were under defendants' immediate control. It was far from portable, and too heavy even to be carried by the average person. It had also, as the agents well knew, just been unloaded from a train's baggage car after a cross-country trip suggesting, as proved to be the case,

[1] Because of the physical proximity of the suitcases and the footlocker to one another at the time of the arrests, the district court also made an additional finding that the "search-incident exception" could not save the suitcase searches; the court found that, as with the footlocker, "there was no showing that, at the time of arrest, the suitcases were within the immediate possession or control of any of the defendants" (Pet. App. 57a-58a).

that it was tightly secured and could not be opened; nor did the agents observe it open before they themselves opened it. We thus see no basis for disturbing the court's finding that, for purposes of the *Chimel* standard, "this footlocker was simply not within the control of the defendants at the time of arrest." (Pet. App. 15a).[3]

Finally, noting the district court's finding that the footlocker "was not in imminent or even potential danger of being destroyed or spirited away," the court of appeals agreed that "there was no special exigency justifying a warrantless search under the circumstances" (Pet. App. 19a). Nor, the court added, had the government ever even argued that there were any exigent circumstances (*id.*).

The court of appeals also responded to two new theories raised by the government at this stage. One theory was that because the arrests had occurred outside any dwelling, the legality of the warrantless footlocker search should not be tested by the "stringent" standard of *Chimel* v. *California*, 395 U.S. 752 (1969), but rather by the more liberal standard of "reasonableness" (Pet. App. 11a-12a). The court of appeals rejected this argument, stating that it knew of "no decision of the Supreme Court . . . more relevant to the arrest situation presented here" than *Chimel* — and that *Chimel*, like the Fourth Amendment itself, is not limited by rationale or precedent to arrests occurring only inside houses (Pet. App. 12a).

The other new theory — calling for "liberalized baggage search rules" which would dispense with the warrant re-

[3] The court of appeals also affirmed the district court's finding that the suitcases were outside respondents' control at the time of arrest (Pet. App. 20a) and that their warrantless search could not be justified as a reasonable inventorying (Pet. App. 23a).

requirement altogether in connection with luggage searches outside the home — was suggested, but not squarely presented, by the government.[4] The court of appeals did, however, consider and reject it. Pointing out that the new approach suggested by the government "could have considerable impact, as its premises might seem to apply not only to baggage but to mail, express packages, and moving freight of all description" (Pet. App. 18a), the court of appeals noted that such a "would-be exception" hardly meets the requirement that exceptions to the warrant rule be "specially established" and "well-delineated" (*id.*).[5]

[4] As the court of appeals noted: "While we understand the government to be relying on the search-incident-to-arrest exception, part of its argument *suggests* that it may also be looking in the direction of liberalized baggage search rules. . . ." (Emphasis added.) (Pet. App. 16a.)

[5] Senior District Judge Thomsen, writing in dissent, disagreed, stating that in his opinion the warrantless search of the footlocker was permissible under the same "principles which control the right of an officer to arrest without a warrant a person who is committing a felony in his presence in a public place. . . ." (Pet. App. 29a-30a.)

Introduction and Summary of Argument.

The government in this case seeks to amend the Fourth Amendment so as to eliminate the warrant requirement for all searches of "persons" and "effects" except those which occur inside the home or office, or involve selected kinds of communications.

Both lower courts found, on the facts, that the government had failed to meet its burden of proving that the warrantless search of the securely locked, virtually nonportable footlocker was lawful: both courts found that no exception or exigency excused the neglect of the agents to seek advance judicial approval for the search. These rulings were based on the most fundamental tenet of Fourth Amendment jurisprudence — that a search conducted in the context of a criminal investigation, depending for its justification on an individualized determination of probable cause, must be authorized in advance by a neutral and detached judicial officer, unless one of the "few specifically established and well-delineated exceptions" is proved by the government. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971), quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967). For the last century this rule has formed the cornerstone of Fourth Amendment law, and, as the government concedes, has, in the context of criminal investigative searches, been stated in broad and unequivocal terms. See GB 32. The underlying purpose of this rule is to secure to "the individual [his] legitimate expectation of privacy against the overzealous police officer." *South Dakota* v. *Opperman*, ____ U.S. ____, 96 S. Ct. 3092, 3097, n. 5 (1976).

Here, faced with the lower court rulings — and aware that it cannot secure the reversal of decisions based on the application of settled principles to the facts of a particular case — the government now asks this Court to amend the warrant clause and restructure its rule so that it will no

longer apply to a case such as this in which personal effects outside the home are searched on the belief that evidence of crime will be found. Henceforth, under the government's proposed new rule, the warrant requirement would apply solely and exclusively to property which is found *inside* the home or office, and to "private communications" conducted over the telephone or via first-class mail; in all other situations the obligation to seek advance judicial approval would be eliminated and the law enforcement officer in the field would be entirely free to conduct warrantless searches based on his own determination of probable cause. A shopper's parcels, a lawyer's litigation bag, a traveler's padlocked steamer trunk, would all fall into the warrant-free zone of non-privacy.

In the past, when the government has sought to expand the right to search without a warrant it has done so on the basis of argument and evidence demonstrating the need for swift police action under particular circumstances. Here, however, it seeks the broadest possible expansion of the searching power without even suggesting that such an expansion is compelled by practical considerations of effective law enforcement. And the few theoretical arguments it does offer the Court in support of its unprecedented request are without valid evidentiary support and ignore or conflict with unimpeached decisions of this Court.

Initially, the government argues that the Framers' "intent" was to exclude personal "effects" outside the "home" from the protective scope of the warrant requirement. Ignoring the plain wording of the Amendment itself — guaranteeing "the right of the people to be secure in their *persons, houses, papers, and effects*" and requiring that a warrant describe "the place to be searched" (emphasis added) — the government claims that the Framers intended to distinguish "effects" from the other categories and to afford them protection only *inside* "houses," and further intended to limit "the *place* to be

searched" to the "home." This is, on its face, an absurd reading of the plain language of the Amendment and it finds absolutely no support in the historical record.

Indeed, the only real evidence offered by the government in support of its historical theory is that the Framers were "preoccupied" with the hated writs of assistance. But, as the government itself concedes, the writs empowered officials "to enter *anywhere*" to search for smuggled goods (GB 22; emphasis added), and ". . . to open *any* trunks, chests, boxes, parcels or packs . . . whatever in which goods, wares, or merchandise [were] suspected to be packed or concealed." Quincy, *Reports of Massachusetts Bay* 404-405 (1865) (emphasis added). This all-encompassing searching power was plainly not limited to the home. Ironically, had there been railroad trains and stations during colonial times, the search of the footlocker in this case would have been conducted squarely under the authority of a writ.

Furthermore, the government's reliance on a claim of colonial unconcern about warrantless searches of chattels outside the home assumes that an *absence* of articulated outcry means that the colonists either acquiesced in such search practices or would have acquiesced had such practices been the most abusive ones occurring at the time. As Amsterdam points out, however, the "absence of controversy" over a particular evil cannot be used to "support the negative inference" that the Framers did mean "to limit or forbid or [that] evil." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 397, 398 (1974).

Nor does the early history of Congressional and judicial interpretation of the searching power support the government's view. The early legislation cited by the government applied exclusively to *customs* situations and granted power to search only for goods imported in violation of customs laws. And, moreover, even the customs searching power was circumscribed by procedural safeguards which were more protective than customs practices today. The message of the

earliest Supreme Court decisions interpreting the Fourth Amendment is even clearer: no distinction was made between the protections of the Fourth Amendment within and without the home (*Ex parte Burford*, 3 Cranch 448 (1806); *Ex parte Jackson*, 96 U.S. 727 (1877); *Boyd* v. *United States*, 116 U.S. 616 (1886)), and "letters and sealed packages" were guarded by the warrant clause "wherever they may be." *Ex parte Jackson*, *supra*.

Moreover, even if the government were correct that the Framers sought only to extend the warrant requirement to the internal boundaries of their homes, that intent emerged out of a home-bound age. In today's world, in which travel and mobility play a vital role in society, the need to protect one's privacy in baggage is certainly as great as was the colonial need to protect the privacy of one's home. Increasingly the American family is on the move — lugging with it, in cardboard boxes, suitcases and trunks, all the possessions of its "home." Even on brief business or vacation trips the traveller carries along personal papers and possessions which "touch upon intimate areas of an individual's personal affairs" which may "reveal much about a person's activities, associations and beliefs." *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring).

The government concedes that, under the modern construction of the Fourth Amendment, the "maximum protection from governmental search and seizure" — the warrant requirement — is bestowed upon a particular interest when there is a "practical realization of [a] considerable expectation of privacy" in that interest and an "intrinsic societal importance of satisfying that expectation." GB 30. It is settled, however, that that expectation of privacy is measured *not* by the four walls of the individual's home but by "what he seeks to preserve as private, even in an area accessible to the public." *Katz* v. *United States*, 389 U.S. 347, 351 (1967). Thus, even though Katz allowed himself to be "visible" through the glass portion of the telephone booth, the Court held that he was nonetheless "entitled to assume" that the aspect of his life he *had* sought

to preserve as private — the wagering conversations in which he had engaged — would "not be broadcast to the world." 389 U.S. at 352. The plain implication of this principle is that when a traveler places his effects inside opaque, locked luggage and leaves his home, he does not, *by virtue of leaving his home*, waive his right to keep those effects "private and away from prying eyes."

Nor does the mere fact that luggage is "movable" entitle the government to treat luggage as identical to the automobile for purposes of the Fourth Amendment. As the government itself concedes, while the mobility of an automobile "may frequently excuse the warrantless *seizure* of a car under the 'emergency' exception to the warrant requirement, [that mobility] is analytically an *insufficient justification* for the subsequent *search* of the car without prior judicial approval." GB 35 (emphasis on "seizure" and "search" in original). The key factor which justifies the post-seizure warrantless search of the automobile is the recognized "lesser expectation of privacy" in the automobile. GB 35. Even when detained by law enforcement officers, luggage which is securely locked does *not* lose its "significant Fourth Amendment" interest — an interest in the privacy, not of the outer trappings, but of the *inner* contents, kept "private and away from prying eyes." See *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). It is that interest which, under the plain intendment of the Fourth Amendment, may not, in the absence of exception or exigency, be breached without prior judicial authorization. *Id.*

The government runs roughshod over these most basic principles in its quest for expansion of the searching power — and in doing so it totally reverses the reasoning process which has undergirded Fourth Amendment analysis for at least a century. It assures the Court that if the warrant requirement were eliminated outside the boundaries of the home, no benefits to the citizen would be lost because *probable cause* would still remain "a stringent requirement" before a law enforcement officer could properly search the citizen's locked luggage (GB 44): once thought a

necessary prerequisite to obtaining a warrant, *probable cause*, according to the government, would now be sufficient to *dispense* with a warrant.

The government argues further that, especially when the probable cause at issue is probable cause to believe that contraband is present, no warrant should be necessary because of an asserted lesser expectation of privacy in contraband. But this assumes as its very premise that the searching officer is always right when he formulates a belief about what will be found as the result of a search; for if the searching officer is wrong, and contraband is *not* found, then there is *no* lesser expectation of privacy to justify the failure to obtain a warrant.

Finally, the government argues alternatively that if probable cause alone is not sufficient to dispense with the warrant requirement, then the addition of the fact of arrest makes it sufficient. The government does not limit this elimination of the warrant requirement to situations in which the objects to be searched are within the "immediate control" of the arrestees; on the contrary, conceding the rulings of the courts below that in this case the search of the footlocker was not justifiable as a search incident to arrest under the standard of *Chimel* v. *California*, 395 U.S. 752 (1969), the government argues that a search of *any* belongings, outside the reach, but within "the possession," of the arrestee, is permissible without a warrant. By this argument, the government seeks *sub silentio* to resurrect the holding in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950) — squarely overruled by this Court in *Chimel*. But even under *Rabinowitz* the rule allowing searches "accompanying" arrests was limited to *contemporaneous* searches and to situations in which obtaining a warrant was impracticable. Here, however, the search took place an hour and a half after the arrests — and the government has never even suggested that it would have been impracticable or even inconvenient to obtain a warrant.

In sum, the government has offered not a single reason to take the drastic measure it proposes: neither its unsupported divination of the Framers' intent, nor its inaccurate analogy between locked luggage and the automobile, nor its hindsight reasoning from the results of the search, nor, finally, its desire to resurrect the discredited rule that the mere fact of arrest allows a search of personal property unrestrained by either the limits of the *Chimel* standard or advance judicial approval, can justify elimination of the warrant requirement for searches of locked luggage outside the home.

Argument.

I. The Fourth Amendment Warrant Requirement Applies To Personal Effects "Wherever They May Be" And Neither History Nor Decisional Law Supports Limitation Of The Warrant Clause To The "Home."

As the government concedes, "the constitutional preference for a warrant and the presumptive unreasonableness of a warrantless search" has been articulated by this Court in broad and unqualified terms. GB 32. Indeed, this Court has described that unqualified preference as "the most basic constitutional rule in this area" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 454 (1971)), emphasizing time after time that a probable cause search, conducted without a warrant, is "unreasonable under the Fourth Amendment" — unless one of the "few specifically established and well-

delineated exceptions" is proved by the government (see *Katz* v. *United States*, 389 U.S. 347, 357 (1967)).[6]

> "The exceptions are 'jealously drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971).[7]

A. *In The Criminal Context, It Is The Warrant Requirement Which Protects The Person's Legitimate Expectation Of Privacy.*

It has never been doubted that the "central warrant requirement" (Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 394 (1974)) is tied inextricably to the concept of probable cause. As the government concedes, it "is by now axiomatic that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause.'" GB 9, quoting *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring). Just last Term, in *South Dakota* v. *Opperman*, *supra* ____ U.S. at ____, 96 S. Ct. at 3097, n. 5, Mr. Chief Justice Burger pointed out that the warrant requirement is "linked . . . textually . . . to the probable cause concept."

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[6] This rule has been stated without qualification in numerous decisions of this Court: *e.g.*, *South Dakota* v. *Opperman*, ____ U.S. ____, ____, 96 S. Ct. 3092, 3097 (1976) (Powell, J., concurring); *Agnello* v. *United States*, 269 U.S. 20, 33 (1925); *Wong Sun* v. *United States*, 371 U.S. 471, 481-482 (1963); *Jones* v. *United States*, 357 U.S. 493, 498 (1958); *Cady* v. *Dombrowski*, 413 U.S. 443, 439 (1973).

[7] As Amsterdam points out, all the "exceptions" to the warrant requirement (with the exception of consent) are based on the principle of "necessitous haste." Amsterdam, *supra*, 58 Minn. L. Rev. at 395.

Probable cause is not, however, an element in all Fourth Amendment search cases. As the Court noted in *Opperman*, "[t]he standard of probable cause is peculiarly related to criminal investigations." *Id.* Thus, the court noted that when searches are conducted outside the "criminal-investigative-enforcement process," in contexts requiring routine, standardized procedures conducted for caretaking or protective purposes, "[t]he probable cause approach is unhelpful." *Id.* In such situations — in which the search is not justified on the basis of an individualized determination of probable cause — the warrant requirement also has a reduced usefulness, and consequently this Court has upheld such searches as "reasonable" without a warrant. *Id.*[8] This Court has, however, consistently enforced the warrant requirement when the search occurred in the context of a criminal investigation and was based on an individualized determination of probable cause. See, *e.g.*, *Katz*, *supra*.[9] Indeed, the warrant requirement for probable cause searches — and the presumption that a warrantless probable cause search is "unreasonable" — has been a corner-

[8] *E.g.*, *Opperman*, *supra*; *Cooper* v. *California*, 386 U.S. 58, 61-62 (1967); *Harris* v. *United States*, 390 U.S. 234, 236 (1968), and *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973), upholding routinized inspection procedures in connection with standard caretaking functions (see *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3098-3099, discussing the rationale for the *Cooper*, *Harris* and *Cady* decisions). *United States* v. *Martinez-Fuerte*, ____ U.S. ____, ____, 96 S. Ct. 3074, 3083 (1976), upholding "routine checkpoint stops" in connection with enforcement of customs and immigration laws conducted in a "regularized manner" at fixed checkpoints "not chosen by officers in the field"; *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968), upholding intrusion in context of need to protect law enforcement officers or others from immediate danger.

[9] Additionally, warrants have sometimes also been required outside the context of a criminal investigation when

> "[t]he practical effect of [the warrantless search procedure was] to leave the occupant subject to the discretion of the official in the field." *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967).

stone of this Court's Fourth Amendment jurisprudence for at least a century.[10]

Central to the distinction between the "reasonableness" of warrantless searches in non-probable cause settings on the one hand, and the necessity of a warrant when probable cause is at issue on the other, is the notion that the Fourth Amendment interest in privacy is peculiarly threatened when a law enforcement officer singles out an individual for a search "to discover evidence of crime." *Opperman*, *supra*, ____ U.S. ____, 96 S. Ct. at 3103 (Powell, J., concurring). As the Court recently noted in *Fisher* v. *United States*, 425 U.S. 391, 400 (1976):

> "The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy become justified and a warrant to search and seize will issue."

The special protection to privacy provided by the warrant is, as this Court has "frequently observed," that

> "[t]he warrant requirement assures that legal inferences and conclusions as to probable cause will be drawn by a neutral magistrate unrelated to the criminal in-

[10] See, *Boyd* v. *United States*, 116 U.S. 616 (1886); *Ex parte Jackson*, 96 U.S. 727 (1877); *Gouled* v. *United States*, 255 U.S. 298 (1921). In *Gouled*, the Court stated:

> "Searches and seizures are as constitutional under the Amendment when made under valid search warrants as *they are unconstitutional, because unreasonable, when made without them*, — the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All this is abundantly recognized in the opinions of the *Boyd* and *Weems cases*. . . ." (Emphasis added.) 255 U.S. at 308.

See also Amsterdam, *supra*, at 363.

vestigative-enforcement process." *Opperman, supra,* ___ U.S. at ___, 96 S. Ct. at 3097, n. 5.[11]

Thus, in "the criminal context [it is] the requirement of a warrant [which] protects the individual's legitimate expectation of privacy against the overzealous police officer." *Opperman, supra,* ___ U.S. at ___, 96 S. Ct. at 3103 (Powell, J., concurring).

Inevitably, when no warrant is required, and the neutral judgment of the magistrate is lost, the risk of improper intrusions into the privacy of innocent persons multiplies greatly — even assuming all searching officers act in good faith. Such officers are, after all, "engaged in the often competitive enterprise of ferreting out crime" (*Johnson* v. *United States*, 333 U.S. 10, 14 (1948)) and thus may not be relied upon to achieve the precision of the neutral magistrate in sifting evidence, separating fact from suspicion, determining dispassionately whether additional investigation is necessary, and setting precise and predefined limits on the scope of the search. In *Katz, supra,* this Court specifically recognized that the agents in that case "acted with restraint" (389 U.S. at 356) and on facts sufficient to secure a warrant had they sought to do so. *Id.* at 354. It held, however, that this was not enough:

> "[T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They

[11] "A related purpose of the warrant requirement is to prevent hindsight from affecting the evaluation of the reasonableness of a search." *Opperman, supra,* ___ U.S. ___, 96 S. Ct. at 3103 (Powell, J., concurring).

> were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." 389 U.S. at 356-357.

B. *No Valid Reading Of History Supports The Government's Unprecedented Claim That Even In The Absence Of Exception Or Exigency The Fourth Amendment Warrant Requirement Applies Only To The "Home."*

Although the government can point to no case in the area of criminal investigatory searches in which this Court has signaled a retreat from the "most basic" rule -- imposing the warrant requirement on all probable cause searches — the government now seeks to restructure the contours of that rule and confine its operation exclusively to two situations: searches of homes or offices, and searches of "private communications," as defined by the government.[12] See GB

[12] Although the government assures at several points in its brief (GB 12, 13, 30) that it does not seek to eliminate the warrant requirement in connection with searches of "private communications," a careful reading of the government's position reveals that in actuality the government would apply the warrant requirement to "private communications" only in two contexts — when such communications were conducted either over the telephone or through the use of first-class, domestic mail (GB 30, n. 18, 44, n. 31). Thus, all "private communications" conducted through other channels — ranging from use of cable or teletype communications, to delivery of written communications by privately-hired messenger service, to sending papers by other forms of mail — would presumably be subject to searches and seizures on the same warrantless terms the government claims should apply to situations outside the home or office.

12-13, 29-31. For all other searches conducted in connection with the investigation, the government would *eliminate* the warrant requirement altogether. Henceforth, probable cause, as determined by an individual law enforcement officer operating in the field, would suffice to authorize the search and seizure of a citizen's personal property found outside home or office — whether that property were carried in a brown paper bag, a locked attache case, or a padlocked steamer trunk.

The government does not seek to justify this proposed revision of the "most basic" rule as a new "exception" to the warrant requirement, demanded by "exigencies" which make "that course imperative." See *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 454-455. Indeed, the government makes no claim of emergency or law enforcement need, or even convenience of the searching officers.[13] Rather, adverting to the principle of "reasonableness" — which it describes as "the guiding standard of the Fourth Amendment" (GB 10) — the government asserts that a probable cause search is "reasonable," and therefore permissible, without the protection of a warrant, so long as the privacy interest at stake falls outside of what the government defines as the "core" "privacy areas" of home and private communications. GB 10, 12.

There are two fundamental errors in this contention. First, the government draws its "standard" of "reasonableness" from cases in which probable cause was *not* in issue and in which the warrantless invasions of privacy were

[13] It is noteworthy that at *no* point during this entire litigation has the government ever raised a claim of exigency, and both lower courts specifically found that none existed to excuse the agents' neglect to obtain a warrant (Pet. App. 19a, 50a).

justified as caretaking or protective measures.[14] Second, in defining what it terms the "core" "privacy areas," the government ignores its own advice that Fourth Amendment analysis must depend "upon the facts and circumstances of each case" (GB 9) — and totally ignores the modern construction of the Fourth Amendment, discussed below at p. 47 et seq., which defines privacy in terms of reasonable expectations of privacy and not predefined "areas."[15]

Because the government's analysis flies so directly in the face of the established and unqualified presumptive warrant requirement and so violates the principles which have shaped the development of Fourth Amendment law during the past century, the government is forced to seek support for its reasoning process by jumping back in time to the

[14] The cases cited by the government for this "standard" are *Opperman*, *supra*; *Cooper* v. *California*, 386 U.S. 58, 59 (1967); and *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (GB 9), all cases in which the searches were upheld on the grounds of caretaking or protection. The government's wholesale importation of the "reasonableness" concept into cases in which private property is searched neither as a routine procedure nor for protective purposes, but rather "in order to discover evidence of crime" (see *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3103 (Powell, J. concurring)), harks back to previous efforts the government has made to argue that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable" — a view which, however, "has not been accepted" by this Court. *United States* v. *United States District Court*, 407 U.S. 297, 315, and n. 16 (1972). See *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3102 (Powell, J., concurring).

[15] Like its reliance on the concept of "reasonableness," the government's would-be restriction of the warrant requirement to two core "privacy areas" harks back to earlier unsuccessful efforts it has made to persuade this Court to uphold warrantless searches as falling outside a "constitutionally protected area." See *Katz*, *supra*, 389 U.S. at 351.

original "intent" of the Framers.[16] Claiming to divine the Framers' true intent — and claiming that the application of the warrant requirement to any searches "outside the privacy of the home" (GB p. 25) runs counter to that intent[17] — the government argues that now is the time to undo at least the last century of this Court's Fourth Amendment jurisprudence, retrace the detour once made and return to the original "intent" of the Amendment.

It is highly doubtful that the government's exercise in retrospective analysis of colonial intent can serve any useful purpose in evaluating the competing social policies which must be reconciled in Fourth Amendment decisions made today, some two hundred years later. However, even if

[16] The government also seeks support, in a subsidiary fashion, by drawing an analogy between baggage outside-the-home and the automobile, and arguing that the same principles which created the "automobile exception" should now be applied to eliminate the warrant requirement for searches of luggage found in public places. The analogy, however, is false: as will be fully demonstrated below at pp. 53-58, the reasonable expectation of privacy in the contents of one's luggage — particularly if visibly locked and secured — is far greater than one's "lesser expectation of privacy in a motor vehicle . . . [whose] function is transportation and . . . [not] the repository of personal effects." See *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974); *Opperman*, ___ U.S. at ___, 96 S. Ct. at 3096.

[17] The government never claims that the intent of the Framers also justifies including within the class of searches protected by the warrant requirement those searches outside the home but of "private communications." Indeed, the government never offers *any* historical argument to rationalize its claim that the Framers intended the warrant requirement to apply *only* to searches conducted *inside the home* with its broad concession that the warrant requirement *does* apply to "private communications" conducted in public places. Rather, it concedes that the basis for including "private communications" in its class of "core" privacy interests rests not on history but on the modern and "practical realization of the considerable expectation of privacy placed on conversations held in private and the intrinsic societal importance of satisfying that expectation" (GB 30). As will be discussed below, p. 47 et seq., however, this "practical realization" applies with equal force to the expectation of privacy placed in a securely locked piece of baggage which is carried outside one's home and "the intrinsic societal importance of satisfying that expectation" is no less.

this Court were inclined to retrace the origins and history of the Amendment in the belief that it should be bound by a narrow reading of the Framers' intent, the result reached would in no way support the drastic curtailment of the warrant requirement which the government now seeks to impose. On the contrary, as will be demonstrated below, the historical evidence affirmatively supports the opposite conclusion — namely, that the protections of the warrant clause were intended to encompass personal property whether inside or outside the home.

C. *Contrary To The Government's Claim, The Historical Record Indicates An "Intent" To Include Within The Warrant Requirement Searches Of Personal Effects "Wherever They May Be."*

The essence of the government's historical argument is its claim that "the primary, if not the sole, purpose of the Fourth Amendment" was to protect against the free-wheeling house searches which had been authorized by colonial writs of assistance, and that, therefore, the Framers never intended the protections of the warrant clause to spill outside the home and encompass searches of personal property in public places. GB 10. At bottom, this claim is built on a faulty reasoning process which totally ignores certain aspects of the historical record and, moreover, draws its major strength from a series of negative inferences based not upon historical data but upon *absences* of such data from the record.[18] The government introduces no evidence which affirmatively establishes or even indicates that the Framers *intended to exclude* searches of personal property

[18] Since ancient times, philosophers have recognized this type of reasoning to be the fallacy of *argumentum ad ignorantium*. See, *e.g.*, R. Popkin, *Philosophy Made Simple* 165 (1956) ("This argument contends that some statement must be true because there is no evidence to disprove it.").

found outside the home from the protections of the warrant clause. And the historical evidence which is available — particularly the text of the Amendment itself — points strongly in the opposite direction. Certainly the 19th century interpretations of the Fourth Amendment by this Court leave no doubt that, *at that time*, it was recognized that the warrant clause did not evaporate at the door to an individual's home.

1. The Government Supplies No Actual Evidence Of An "Intent" To Exclude Personal Effects Outside The "Home" From the Protections Of The Warrant Clause.

Noting, quite rightly, that the Fourth Amendment was adopted against a background of abuse arising primarily from the unrestrained use of the general warrant to rummage through houses, the government makes two observations: first, that "the historical record reflects no . . . concern by the colonists . . . at the spectre of an unjustified search or seizure of chattels that had voluntarily been removed from the dwelling" (GB 24), and, second, that "nothing in the pertinent history suggests that the Framers were troubled by warrantless searches outside the home. . . ." GB 25. From these two *absences* in the historical record, juxtaposed against the affirmative evidence of opposition to general house searches, the government seeks to draw the conclusion that the colonists *had* no objection to warrantless searches of chattels which occurred outside the home and therefore intended the warrant clause to apply to in-house searches only.[19]

[19] It should be noted that the government's reasoning process, if adopted, would lead with equal force to the conclusion that the reasonableness clause of the Fourth Amendment *also* was not intended to apply to searches of chattels outside the home: if the Framers were so unconcerned about such outdoors searches as to omit them from the reach of the warrant clause, there is no reason to conclude that they intentionally included them within the reasonableness clause. This is especially so since, as the government argues, the reasonableness clause was "stated merely as a basis" for the condemnation of the writs of assistance and had no independent significance. GB 26, citing Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 81, n. 10 (1937). See also Landynski, *Search and Seizure and the Supreme Court* 42-43 (1966). (The government attempts to paper over this flaw in its reasoning process with the bare, conclusory assertion that the Framers were "content to leave such searches [which occurred outside the home] to the test of reasonableness." GB 11.)

The unstated major premise of the government's syllogism is that the colonists were in fact *subjected* to all types of searches and seizures of personal property outside the four walls of their homes and unauthorized by writs of assistance. Plainly, unless so subjected, the colonists' *lack* of publicized objection to anything other than general house searches cannot be read as an indication that the colonists *acquiesced* in such searches and therefore intended the Fourth Amendment to exclude them. But that unstated premise is demonstrably false. Indeed, the reason that there is no recorded evidence of controversy about warrantless searches of personal property outside the home is that, except for the narrowly circumscribed search-incident-to-arrest, there were no such warrantless searches in public. To place the silence of the Framers in proper perspective, it is necessary to review the types of searches which in fact formed the experience from which that silence arose.

THE SEARCHING POWER DURING COLONIAL TIMES.

During the colonial period — apart from the searches authorized by writs of assistance to which the colonists raised such vociferous objections — there were only two other types of searches: the common law search incident to arrest and the search for stolen goods. Taylor, *Two Studies in Constitutional Interpretation* 24-29 (1969). The first was a true warrantless search. But, as Taylor points out, it was a power rarely exercised since it applied only to the arrest

of felons (and "a man leaves himself open to an action . . . if he takes as a felon one who has done no felony") and since "arrests were rarely made except when there was hot pursuit after a 'hand-having' thief," (Taylor, *supra*, at 28 (quoting Pollock and Maitland)), or upon "hue and cry" after a "dangerous cut-throat" (see *id.* at 39). It was, moreover, a power usually exercised not by a government official, but rather by the private victim of the theft or attack who was able to outrun and overtake the violator of his rights. In such restricted form, this warrantless search "had the full approval of bench and bar" in both America and England (*id.* at 29); indeed, the absence of governmental involvement and the plain justice and necessity of allowing such searches guaranteed community support for the practice. As Taylor comments, "What need for a warrant to justify a search that was so natural a concomitant of apprehending and convicting a dangerous cutthroat?" *Id.*, at 39.

The second type of search did, however, require a warrant. If the "hand-having" thief got away, and the victim reasonably believed that he knew where the stolen goods were secreted, the victim could obtain a warrant to search for the stolen goods — a warrant which expressly allowed him to enter the premises of another. Kaplan, *Search and Seizure: A No-Man's Land in Criminal Law*, 49 Calif. L. Rev. 474-475 (1961). As the government itself recognizes, this type of warrant resembled that ultimately required by the Fourth Amendment: "it was surrounded by procedural safeguards such as an allegation of probable cause under oath, and it could only be issued by a court." GB 18.[20] Moreover, as the government also recognizes, gradually the type of warrant used to search for stolen goods could also be obtained to search for "two forms of contraband — goods

[20] Additionally, as was the case with the common law arrest, the accuser who initiated the process risked heavy damages were he mistaken about his facts. Kaplan, *supra*.

on which the proper tax had not been paid and the means or instrumentalities of a crime." GB 18, citing Kaplan, *supra*, at 475. This expansion of the subject matter brought the stolen-goods type warrant even closer in substance to the warrant requirement eventually incorporated into the Constitution.

Thus, when the government points out a lack of recorded controversy about warrantless searches of chattels found outside the home, the most that it does is point out an absence of controversy about the common law power to conduct a warrantless search incident to arrest without a warrant. It should hardly occasion surprise that the long-sanctioned common law right to search the hand-having thief or cutthroat incident to his arrest was not a burning issue in Revolutionary days. The only other types of searches which were known — those for stolen goods or the like, or those encompassed by the writs of assistance — were in fact searches which could *not* be done *without* some form of warrant.

THE ALL-INCLUSIVENESS OF THE WRITS OF ASSISTANCE.

Nor can the government rely on the colonial objection to one of those forms of warrants — the hated writs of assistance — as evidence that the colonists did *not* object to "warrantless searches outside the home" (GB 25) or to the "search or seizure of chattels that had voluntarily been removed from the dwelling." GB 24.[21] The government as-

[21] The government's only documentation for this assertion is a citation to Taylor's discussion of search incident to arrest at 39 and 43, where, however, no such distinction between chattels inside and outside the home is made. Elsewhere, Taylor points out that no special sanctity of the home placed restrictions on the search incident to arrest; indeed as long as the search was made contemporaneously, the arrest could validate a warrantless search of an entire household. Taylor at 28-29. The government's only other authority for this assumed distinction

sumes throughout its historical presentation that the writs of assistance were *limited* in scope and could not, or did not, authorize searches outside the home. But it offers no support for this assumption and the historical record indicates quite the opposite.

The colonial writs of assistance were aimed primarily at smugglers[12] and they empowered customs officials to search absolutely *anywhere* — "wherever they suspected uncustomed goods to be" (Lasson, *supra*, at 54), whether in public or private areas — and " . . . to open any trunks, chests, boxes, parcels or packs . . . whatever in which goods, wares, or merchandise are suspected to be packed or concealed." Quincy, *Reports of Massachusetts Bay* 404-405

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between the home and all other places — a distinction which is fundamental to its entire argument — is a recent Supreme Court case allowing warrantless arrests on probable cause in public places. *United States* v. *Watson* 423 U.S. 411 (1976), cited at GB 25 for this purpose. The government neglects to mention, however, that the common law recognized no greater distinction between homes and public places when it dealt with arrests than when it dealt with searches and seizures. At common law, officers of the peace could arrest felons *in their homes* without a warrant. Taylor at 27-29. Cf. *United States* v. *Santana*, 427 U.S. 38 (1976). Just as a colonial citizen could not claim immunity from lawful powers of the government merely by entering his home, so could the government not claim the power to unreasonably invade his rights of personal security merely because he left it.

[12] The general warrants prevalent in England during the 17th and 18th centuries — unlike the colonial writs of assistance — had been used primarily to seize papers and books in particular cases of libel. See GB 18-22. As even the government recognizes, the writs of assistance, which provided customs officials with "continuous license and authority" to conduct wide-ranging searches for smuggled goods without limitation to any particular cases, "were in many ways more objectionable than the general warrants." GB 22. It was the use of these writs — whose focus was smuggled goods — which appears to have most directly motivated the colonists to erect the protections of the Fourth Amendment.

(1865) (quoting a writ issued in 1755).[13] While the language of the writs may have specifically authorized the agents of the Crown to enter into houses, shops, warehouses, cellars, ships and other structures in order to locate and seize those "trunks, chests, boxes, parcels or packs" in which "goods, wares, or merchandise [were] suspected to be packed or concealed" (id.), that enumeration was inclusive, not exclusive, and did not *limit* the authority of the agents to conduct their searches and seizures only in those places named.[14] Indeed, the fact that houses, warehouses and ships were specifically enumerated in the writs would appear to reflect nothing more than the general recognition at the time that smuggled goods were most likely to be found in such places.[15]

Moreover, it is evident that to the extent that a ship was, in colonial times, comparable to the modern day railroad train — carrying passengers, baggage and goods belonging to persons other than the ship's owner — the opening of "trunks, chests, boxes, parcels or packs" found aboard ship

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[13] For fuller discussion of the powers granted by the writs, see, *e.g.*, Quincy, *Reports of Massachusetts Bay* 400-410, 500-510 (1864); Lasson, *supra*, at 32, 53-54; *Stanford* v. *Texas*, 379 U.S. 476, 481-484 (1965).

[14] "The Rights of the Colonists and a List of Infringements or Violations of Rights, 1772," 1 Schwartz, *The Bill of Rights: A Documentary History* 205 (1971), which describes the scope of a writ, thus includes in the list of places which can be searched the catch-all category *"or any other place* where any goods or merchandize lie concealed, or are suspected to lie concealed." (Emphasis added.) Clearly, "any other place . . . suspected" contains no limitation to suspected *private* places.

[15] At the time, smuggling was an activity confined primarily to the coast and particularly to cities like Boston, and its most profitable form involved the importation of molasses from the French and Spanish East Indies by ship. Lasson, *supra*, at 51-72. The searching pattern of the agents, therefore, was generally to first attempt to search ships at sea, then ships in the harbor, then wharfside warehouses, and, finally, in those cases where they suspected that the goods had travelled that far, homes. *Id.* Since very few, if any, of the smuggled kegs of molasses were transported overland (water travel direct to the port distillery being far more efficient), there was almost no reason to search individual travelers and their baggage in public places, and consequently there would be no pressing need specifically to enumerate the authority to search in such a context.

was in fact tantamount to a search and seizure of chattels in a public place. Since concededly such a search and seizure would have been unauthorized except by a writ of assistance, and since there is no doubt that the strong colonial opposition to the writs included opposition to their use aboard ship,[16] the government's claim that history reflects "no . . . concern about searches and seizures of chattels in public places" falls of its own weight.[17]

In sum, although few were issued, the writs of assistance contained within their four corners all the searching powers of the modern state; so general and expansive were their terms that there is not one type of search, then or now, which such writs could not be deemed to have authorized. Accordingly, when the government argues that the Fourth Amendment warrant clause was aimed at regulating only those powers authorized by the writs of assistance and nothing more (GB 10-11, 16-29), it is in effect conceding that the warrant clause was intended to encompass *all* government searches save those justified as incident to arrest[18] or those for stolen goods, done pursuant to a special

[16] See Schwartz, *supra*, at 205, in which the colonists include in their List of Infringements the use of the writs to conduct searches around "any Ship, Boat, or other Vessel, riding, lying or being within, or coming into any Port, Harbor, Creek or Haven. . . ." See also Lasson, *supra*, at 72.

[17] It is ironic that the government attempts to justify the warrantless search and seizure in this case on a theory that it falls outside the scope of the writs of assistance. Had the respondents lived in colonial times, their arrival in Boston would have doubtless been on board a ship, and the opening of the footlocker and seizure of its contents would have been done squarely under the authority of a writ.

[18] In arguing that the search and seizure of the locked footlocker in this case is of a type originally intended to be excluded from the warrant requirement, the government at no point tries to force the case into the established mold of the search-incident-to-arrest exception — a resolution rejected by both courts below (Pet. App. 15a, 56a). As discussed below at pp. 69-77, its reliance on the fact that respondents were under arrest at the time of the search (GB 13-14, 49-55) is limited solely to a wholly

warrant. Notwithstanding the government's protestations, such an all-encompassing intent necessarily *included* the kind of search at issue here — the search and seizure of locked luggage found in a public place. Thus, all the government's efforts to demonstrate a colonial "preoccupation with general warrants rather than warrantless searches" (GB 25) are misplaced. While the "legislative history" of the Fourth Amendment, and the colonial enactments of the time, may support the government's claim that the Fourth Amendment was aimed primarily against the writs of assistance (see GB 25-28),[19] that data gives *no* support to the government's ultimate contention that searches of personal property outside the home were deliberately excluded by the Framers from the protections of the Amendment.

Moreover, even if the government had brought forth evidence that public searches of chattels had occurred outside the authority of the writs, the fact that the colonists might have objected more strenuously to home searches pursuant to the writs cannot reasonably support the in-

untenable argument that once an arrest occurs the arrestee's legitimate expectation of privacy in *all* of his possessions — even a padlocked footlocker concededly outside his "immediate control" (GB 14) — becomes sufficiently reduced simply to void the warrant requirement altogether.

[19] The government makes much of the fact that the version of the Amendment that was ultimately adopted was not the one originally approved by the Committee of Eleven. GB 26-29. However, that historical fact adds literally nothing to the government's argument. The most the government can glean from that fact is that under the Committee of Eleven version the "preoccupation with general warrants" is clearer than it is under the ratified version. But no matter how definitive that "preoccupation," evidence that the primary concern of the colonists was to eradicate the abuses of the writs of assistance simply does not support the additional and separate claim that the colonists *acquiesced* in searches of personal property outside the home.

ference that they would not *also* have objected to public chattel searches without a warrant.[30] It was just such a fallacy that Lord Camden rejected long ago in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1067 (1765). There, Lord Camden concluded that the existence of numerous cases discussing challenges to stolen goods warrants, and the contemporaneous *absence* of any similar precedents challenging searches for papers, did *not* demonstrate that Englishmen had no objection to searches for papers, but rather provided "an undeniable argument against the legality" of all such searches. See Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945, 954 (1977). The type of negative inference advanced by the King's messengers in 1765 which was so clearly rejected by Lord Camden should not prevail now before this Court two hundred years later.[31]

Ironically, despite its contention that the warrant clause was designed as an antidote to the general searching powers authorized by the writs of assistance, the government now asks this Court to give the individual law enforcement officer a discretionary power to conduct searches in a manner strikingly similar to that authorized by those writs

[30] The government could argue as persuasively that, because the Stamp Act did not apply to personal correspondence, the colonists would not have objected if it had, or that, because a citizen does object to a wiretap on his home telephone pursuant to a warrant, he would not object to being intercepted without a warrant while telephoning from a public telephone booth.

[31] More recently, Amsterdam specifically criticized this type of reasoning process — "the use of background history to support the negative inference that [the Framers] did not [mean "to limit or forbid a particular evil"]" — as not fruitful, stating, "[t]he agreement of many minds upon the decision to disapprove particular practices does not signify the least agreement to approve other practices not upon the agenda." 58 Minn. L. Rev., *supra*, at 398, 395-399. See also L. Fuller, *American Legal Realism*, 82 U. of Pa. L. Rev. 429, 443-453 (1934).

— *viz*: ". . . to open any trunks, chests, boxes, parcels or packs . . . whatever in which any goods, wares, or merchandise are suspected to be packed or concealed" in which he reasonably believes contraband will be found. Instead of obtaining a writ of assistance, the law enforcement official — the government now contends — should be authorized to make such searches and seizures solely on the basis of his own field assessment of probable cause. By contrast, the searches which so incensed the colonists purportedly required *both* some minimal level of cause to believe that smuggled goods might be found, *and* a writ. Indeed, since the writs of assistance were issued solely to enforce colonial trade laws, and not to search for illegal or contraband goods generally, even a writ of assistance could not have authorized the searching power proposed by the government here.

2. Legislation Enacted By The Early Congresses Gives No Support For The Exclusion Of Personal Effects Outside the "Home" From The Protections Of The Warrant Clause.

The government claims that its view of the Framers' intent finds additional support in certain "legislation enacted by the very Congress that drafted the Bill of Rights, and by other early Congresses," legislation which, the government claims, "countenances warrantless searches outside the sanctity of the home." GB 29. The government cites for this proposition three statutory provisions — the Act of 1789, 1 Stat. 29, 43, the Act of March 3, 1815, 3 Stat. 231, 232, and the Act of July 18, 1866, 14 Stat. 178 — which had been previously cited by this Court in *Carroll* v.

United States, 267 U.S. 132, 149-151 (1925). While the portions of these statutes quoted by the government do, on their face, grant power to government officials under certain circumstances to search and seize goods in public places without a warrant, the mere fact that such provisions were enacted by the early Congresses obviously does not guarantee their constitutionality; it has never been presumed that every statute passed by the early Congresses was necessarily constitutional and therefore definitive of the limits of constitutional protections.[33] However, more significantly, when viewed in the context in which they were enacted — and when aspects of their operation not mentioned by the government are taken into account — it becomes readily apparent that these statutory provisions add nothing to the government's case.

All three of the Acts cited by the government were *exclusively customs laws*, regulating the searching powers allowed customs officials at international ports and boundaries, and all three granted power to search only for goods imported in violation of customs statutes.[34] Nor has Congress ever passed legislation which would have authorized such warrantless searches in situations unconnected with the control of international ports and boundaries where "[t]ravellers may be . . . stopped . . . because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belong-

[33] The Alien and Sedition Acts of 1798, for example, were plainly unconstitutional (see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 273-276 (1964)), although passed almost contemporaneously with the ratification of the First Amendment, and by many of the same people.

[34] The titles of the statutes are instructive: The Act of 1789 is entitled, "An Act to Regulate the Collection of Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares, and Merchandises Imported into the United States"; the Act of 1815 is entitled, "An Act Further to Provide for the Collection of Duties on Imports and Tonnage"; and the Act of 1866 is entitled, "An Act Further to Prevent Smuggling and For Other Purposes."

ings as effects which may be lawfully brought in." *Carroll* v. *United States*, *supra*, 267 U.S. at 154.[35] Indeed, the government has not cited a single statute giving law enforcement officers not charged with collecting customs duties similar powers to search without a warrant. Although the government seeks to convey the impression that the early Congresses manifested in the three cited provisions an intent to allow the kind of warrantless search at issue in the case at bar, these provisions simply do not admit of such an interpretation.[37]

Moreover, the government neglects to mention certain significant procedural safeguards which the early Congresses attached to the customs searches authorized by these provisions. Thus, the authority to search was vested in customs officials only, and not in law enforcement agents generally,[38] and the number of customs officials authorized

[35] Moreover, when the government has argued for an extension of the power to conduct border-type searches beyond the definable border area this Court has declined to so extend that power. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973); *United States* v. *Brignoni-Ponce*, 422 U.S. 872 (1975); *United States* v. *Ortiz*, 422 U.S. 891 (1975).

[37] *Carroll* cited these statutes for a different purpose entirely — to demonstrate that even the early Congress recognized the necessity for conducting a warrantless "search of a ship, motor boat, wagon or automobile, for contraband goods, *where it is not practicable to secure a warrant* because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U.S. at 153 (emphasis added). In other words, *Carroll* cited these statutes to support the concept of an exigent-circumstance exception, not the concept of a no-warrant standard.

[38] In its excerpt of the 1866 statute, the government has substituted the bracketed words "certain authorized officers or other persons" for the deleted words "any officer of the customs" (GB 42) — a change which substantially changes the apparent scope of the statutory power to search.

to make these searches was quited limited. The 1789 statute, for instance, provided this power to only one customs official in New Hampshire, to three in Connecticut, to two in New York, to three in New Jersey, to one in Pennsylvania, etc. 1 Stat. 29, 29-32. The 1866 statute further restricted the persons who might make such searches to those who had been "specially appointed as aforesaid" and whose "appointment in writing shall be filed in the custom-house where such appointment is made." 14 Stat. 178. And, the 1789 statute allowed customs officials to open packages only upon probable cause to believe that they contained smuggled goods and only "in the presence of two or more reputable merchants." 1 Stat. 29, 43. This last precautionary procedure suggests that the colonists perceived a significant difference between the seizure of such a package and its later opening, and, indeed, requiring the attendance of two reputable merchants before a package could be opened may well have served many of the same functions of the present-day warrant requirement.

A careful examination of the cited statutes in fact indicates that the early Congresses erected many more precautions and limitations around the customs search than are being implemented in that area today. While the 1789 statute required probable cause before any customs search could be made, and a valid warrant before a dockside warehouse could be entered, these precautions are no longer adhered to — presumably because of the vastly increased traffic of goods and persons across our borders each year.[39] Thus, the government cannot seriously rely on these three statutes to argue that the intent of the Framers was to

[39] Because citizens today may have a lesser expectation of privacy and law enforcement needs may be greater at our national borders and at customs checkpoints than at points in the interior — and because border search practices are routinized and not based on probable cause — search practices which may be justified in border areas will not be countenanced elsewhere. See, *e.g.*, *United States* v. *Ortiz*, 422 U.S. 891 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973).

provide a lessened protection for all private property outside the home. If anything, these statutes indicate a greater, not a lesser, protective attitude on the part of the early Congresses, and suggest that if the development of the searching power has deviated over the past two centuries from the intent of the Framers, it has deviated in the direction of a less protective approach.

3. The Language Of The Amendment And The Earliest Supreme Court Cases Construing It Affirmatively Indicate That The Fourth Amendment Makes No Distinction Between Personal Effects Within And Without The "Home."

In its determination to convince this Court that the Framers intended to exclude searches of personal property outside the home from the protection of the warrant clause, the government overlooks two major factors manifestly relevant to the issue of the Framers' intent — two factors which decisively undermine the government's position.

First, the government overlooks the very wording of the Amendment itself. Both in its final form and in the earlier version approved by the Committee of Eleven (which the government apparently views as a more trustworthy indication of intent, see GB 27-28) the Amendment guarantees "[t]he right of the people to be secure in their ***persons, houses, papers, and effects.***" (Emphasis added.) If the colonists wished to do no more than proscribe the use of writs of assistance to authorize searches of their ***homes***, why does the Amendment contain a seriatim listing of four categories without distinguishing among them, in each of which "the people" are to be "secure . . . against unreasonable searches and seizures"? There is simply no indication in the legislative history that the protected category of "effects" must be limited to "effects" ***inside the home*** in order to merit the full protection of the Amendment. Indeed, such an interpretation would not only require an arbitrary distinction

between "effects" on the one hand, and the other seriatim categories on the other,[40] but it would render the inclusion of the word "effects" absolutely superfluous and misleading.[41]

That the Framers had no intention of limiting the warrant clause to "houses" and to no other place is evident.

[40] Alternatively, the government presumably could argue that the distinction should be between "houses" on the one hand and "persons, papers, and effects" on the other. However, since "persons" and "papers" have both been explicitly held to be protected by the warrant clause even outside the home (see, *e.g.*, *Katz* v. *United States*, 389 U.S. 347 (1967), and *Ex parte Jackson*, 96 U.S. 727 (1878) (dicta)), such a reading of the Amendment would still leave "effects" arbitrarily and illogically isolated.

[41] Interestingly, an earlier version of the Amendment, proposed by the Committee of Twenty (including such notables as Patrick Henry, James Madison and John Marshall), used neither the word "houses" nor the word "effects." It read:

> "That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property, all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected persons, without specifically naming or describing the place or person, are dangerous, and ought not to be granted." Elliot's *Debates*, III, 658, quoted in Lasson, *supra*, at 95, n. 61.

Nothing in the legislative history suggests that the introduction of the phrase "persons, houses, papers, and effects" (which was apparently picked up from the provision adopted in 1780 as Article XIV of the Massachusetts Declaration of Rights, duplicated by New Hampshire in 1784, see Landynski, *supra*, at 38-39) was intended to change the scope of protection which Patrick Henry had described as the "person, his papers and property." Certainly, as Amsterdam points out, *supra*, at 397, "Mr. Justice Frankfurter, who more than any of the other Justices sought the Fourth Amendment's meaning in its history, found there no limitation . . . of the 'persons, houses, papers, and effects' that the amendment protects."

moreover, from the language used to specify the formal requisites of the warrant. Having used the word "houses" in the initial clause containing the general guarantee of freedom from "unreasonable searches," the Framers used a different, broader word for the second, prescriptive clause: "no Warrants shall issue [except if] . . . particularly describing *the place* to be searched" (emphasis added). Had the Framers intended to limit the "place" to the home, it would have been a simple matter for them to do so. The legislative history of the Amendment makes clear, however, that the term "place" was to have the same broad meaning as it had had in the writs of assistance. As discussed above at pp. 29-33, the writs authorized general searches of all "suspected" places, not just of houses. See Lasson, *supra*, at 54. And, indeed, the Committee of Twenty version of the Amendment (quoted in the margin at n. 41), as well as several of the state declarations upon which the Amendment was modelled,[42] used the phrase "suspected places" to describe the broad scope of protection sought. Although the final version of the Amendment omitted the adjective "suspected" there is nothing in that omission to suggest that the Framers also intended to reduce the unlimited concept of "place" to the limited confines of the home.

Second, the government overlooks the message of the early Supreme Court cases which interpreted the Fourth Amendment. In the very first case which arose under the Fourth Amendment, *Ex parte Burford*, 3 Cranch 448 (1806), Chief Justice Marshall held that the Fourth Amendment limits the government's power to arrest as well as its power to search, and requires that an arrest warrant — even if to make an arrest in a public place on probable

[42] See, *e.g.*, Virginia Declaration of Rights, Art. X (1776), (Schwartz, 235); Pennsylvania Declaration of Rights, Art. X (1776) (Schwartz, 265); Maryland Declaration of Rights, Art. XXIII (1776) (Schwartz, 282); Massachusetts Declaration of Rights, Pt. I, Art. XIV (1780) (Schwartz, 342).

cause — be supported by oath or affirmation. Plainly, this holding demonstrates that the members of the Court did not believe that the Amendment was intended to proscribe only the abuses which had arisen in connection with the writs of assistance, or only searches of homes. Surely the Justices in 1806 had better access to the Framers' intent than do government lawyers two centures later.

More significantly, in *Ex parte Jackson*, 96 U.S. 727 (1878), the next relevant case construing the protections provided by the Fourth Amendment,[43] the Court read the Framers' intent in a manner diametrically opposed to the manner proposed by the government here. Faced with the question of enforcing a statute making it unlawful to send certain items through the mail, the Court did not hesitate to announce that a search warrant would be required before a letter or sealed package could be opened, notwithstanding probable cause. Although the Court distinguished "between what is intended to be kept free from inspection, such as letters, and sealed packages . . . and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined" (96 U.S. at 733) — holding a warrant required for the former only — it explicitly rejected any distinction between sealed items in the home and in public places. It stated, "wherever they may be . . .":

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *Id.*, at 733.

[43] *Ex parte Jackson* was the fourth Supreme Court case dealing with the Amendment. The second and third cases (*Smith* v. *Maryland*, 18 How. 71 (1855), and *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272 (1855)) limited the Amendment's application to federal action and to criminal proceedings.

Thus, almost exactly one hundred years ago, this Court answered in the negative a question virtually identical to the one posed by the government in the case at bar today.

Finally, in *Boyd* v. *United States*, 116 U.S. 616 (1886), the next and most important of the nineteenth century cases interpreting the Fourth Amendment, this Court again rejected the distinction between public and private places. Although the government had at one point rightfully possessed a warehouse receipt pertaining to certain goods imported by the Boyds, Justice Bradley, writing for the Court, held that the government could not demand a copy of this quasi-public document to use as evidence in a forfeiture proceeding. Although there had been no actual search — and indeed no government officials had gone anywhere near the Boyds' home — the Court concluded that the protection provided by the Fourth Amendment was not to be so narrowly circumscribed:

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense . . .." *Id.*, at 630.

These cases, read in light of the plain language of the Amendment itself, leave no doubt that the historic intention was not to limit the protections of the Amendment to the four walls of the home.

D. *Even If The Framers Did Not Envision Modern Conditions Of Travel And Living, They Wrote An Enduring Warrant Requirement To Protect Expectations Of Privacy Which, Today, Must Embrace Personal Effects Preserved As Private Even Outside The Home.*

Notwithstanding the clear import of the historical record, and the strong evidence it contains regarding the Framers'

intent, the government argues that the protective scope of the warrant clause was intended by the Framers to be no broader than the most flagrant abuse envisioned at the time of drafting. It has not, however, offered any evidence, or even argued, that the Framers also intended to *limit* application of the warrant clause to that particular vision. Nor could it: it is "the principles and not the Framers' understanding and application of them [which] are meant to endure" (Levy, *Freedom of Speech and Press in Early American History* 309 (New York, 1960)); "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States*, 317 U.S. 349, 373 (1910). See Amsterdam, *supra*, at 399-400. Thus, even if it were assumed, against all the evidence, that the government's construction of the Framers' "intent" is historically accurate, that cannot, and does not, mean that the Framers' particular vision should be imposed on today's society.[44]

1. Because Travel And Mobility Have Come To Play A Vital Role In Today's Society, The Need To Protect The Privacy Of One's Baggage Is Now As Great As Was The Colonial Need To Protect The Privacy Of One's Home.

The Constitution was written for an eighteenth century rural society in which land ownership and concomitant rights of private property were the paramount values. See, *e.g.*, *Entick* v. *Carrington*, *supra*, at 1066. If the Framers' concerns were concentrated in the protection of the home, it was because the home was the center of their lives; and if the rights protected by the Fourth Amendment were

[44] "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken." *Weems* v. *United States*, 217 U.S. at 373.

equated with the rights of landed-private property, it was because those rights were the fulcrum of their politics. See Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945 (1977). Indeed, in colonial times travel was arduous and time-consuming (H. Bragdon, *History of a Free People* 226-27 (1969)), and, because land ownership was typical and self-sufficiency the rule, there was little need to brave the rigors of travel over unpaved roads. Thus, travel was infrequent, and those who were most likely to be found on the road were not "honest householder[s]" (Taylor, *supra*, at 39), but vagabonds, highwaymen and other shiftless persons — persons who were distrusted to begin with precisely because they did not own land. See *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972). The Elizabethan poor laws, in the form in which they were carried over to this country, represented a judgment that such persons ought not travel but should remain in one place and make an honest living. *Id.* If the Framers did not harbor a specific intent to include within the Fourth Amendment the rights of travellers to be free from warrantless searches of their locked luggage, it was because travel and the use of luggage to transport one's most private possessions played no politically significant role in their lives.

The situation in modern America is of course drastically altered. The Elizabethan poor laws and the suspicion toward travellers which they reflected — a suspicion not unnatural in a localized community where out-of-town travel was very rare — "no longer fits the facts." *Edwards* v. *California*, 314 U.S. 160, 174 (1941). Increased mobility and travel play an essential and acceptable role in today's society. While generations of colonial families remained tied to one plot of land, many in America today have no fixed dwelling, living instead in mobile homes, vans or simply carrying their belongings on their backs as they go.

It has been estimated that over a four-year period, almost 37 per cent of the population will pull up their roots, pack the contents of their homes into footlockers and bags, and transport these belongings by private or common carrier to new residences.[45] Economists have argued that increasing this mobility will strengthen our national economy by reducing structural unemployment and easing inflation. P. Samuelson, *Economics* 836 (1973 ed.). Indeed, so important is travel and mobility to modern America that this Court has recognized freedom to travel as a constitutional right. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

Thus, what may have stood alone as a pressing concern in the eighteenth century — the need to protect the privacy of one's home — has now been joined by an equally pressing concern — the need to protect the privacy of one's effects while in transit. When the American family moves its residence it carries with it — in cardboard boxes, suitcases, trunks and other portable containers — all the private personal possessions of its "home." Even on a brief trip, the travelling businessman or vacationer will transport intimate wearing apparel, checkbooks or other financial materials, a diary, correspondence and other personal papers or possibly controversial reading material — items which "touch upon intimate areas of an individual's personal affairs" and which on their face may "reveal much about a person's activities, associations, and beliefs." *California*

[45] Statistical Abstract of the United States 37 (Bureau of the Census, 1975; 96th ed.). Between 1970 and 1974, 36.9 per cent of the population moved to a different dwelling. Only 17.4 per cent of the population moved within the same Standard Metropolitan Statistical Area. *Id.*

Bankers Assn. v. *Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). And, of course, a lawyer often carries in his briefcase or larger litigation bag, locked or unlocked, private papers of the most sensitive nature.[46] Accordingly, even if, as the government urges, the Framers intended the full measure of protections of the Fourth Amendment to reach only to the boundaries of their houses, such a limited intent is plainly inappropriate to the needs of today's society in which citizens often transport in whole or in part the contents of their houses and in which the boundaries of the "home" are no longer so clearly fixed.

2. Under The Decisions Of This Court, The Fourth Amendment Warrant Protection For Personal Effects Is Conditioned, Not Upon Their Being Found In The Home, But Upon The Expectation That The Effects Will Be Kept "Private And Away From Prying Eyes."

As the government concedes, under the modern construction of the Fourth Amendment, the "maximum protection from governmental search and seizure" — the warrant requirement — is bestowed upon a particular interest when there is a "practical realization of [a] considerable expecta-

[46] The government's suggestion that there is a lesser expectation of privacy in baggage than in a home because "[f]ootlockers and other baggage carry only a fraction of a person's possessions and rarely contain personal papers" (GB 37) is absurd. While sometimes "footlockers and other baggage" may carry "only a fraction of a person's possessions," at other times they carry it all; and while sometimes "footlockers and other baggage" may contain no personal papers, at other times that is precisely what they do contain. Nor has this Court ever required a minimum number of items which must be seized or searched before a privacy interest is deemed involved: a sealed package in the mail as well as in a home is protected, regardless of how many items it contains. See, *e.g.*, *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). (See p. 51, n. 51, *infra*, for discussion of the only occasions on which a modern traveller might properly be said to have a lesser expectation of privacy in his locked luggage.)

tion of privacy" in that interest and an "intrinsic societal importance of satisfying that expectation." GB 30.[47] Plainly, this principle is not, and cannot, be limited to effects which are kept within the home. This Court has left no doubt that the protection of the Fourth Amendment "belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry* v. *Ohio*, 392 U.S. 1, 8-9 (1968). See *United States* v. *Brignoni-Ponce*, *supra*; *United States* v. *Ortiz*, *supra*; *Almeida-Sanchez* v. *United States*, *supra*. Indeed, in *Katz*, *supra*, 389 U.S. at 351, this Court squarely rejected a claim by the government — virtually identical to the one presented here — that only certain physical "areas," like the home, fall within the ambit of the warrant clause. It held the considerations underlying "the usual requirement of advance authorization by a magistrate" "do not vanish when the search in question is transferred from the setting of a home . . ." to a public place (389 U.S. at 358-359):

> "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But *what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.* See *Rios* v. *United States*, 364 U.S. 253; *Ex parte Jackson*, 96 U.S. 727, 733." (Emphasis added.) 389 U.S. at 351-352.[48]

[47] The government is forced to make this concession in order to explain why "private communications" occurring outside the home should be protected by the warrant clause since no *historical* evidence supports this concededly necessary conclusion.

Thus, recognizing the significance for Fourth Amendment purposes of whether the individual intended the subject matter to be private, Mr. Justice Rehnquist has written that the "'core' concept of privacy" and concomitant Fourth Amendment protections embrace only those "items the individual owner or possessor has chosen to keep private and away from prying eyes, either official or unofficial." *Privacy and Effective Law Enforcement*, 23 Kan. L. Rev. 1, 4 (1974).[49]

The Reasonable Expectation of Privacy in the Contents of Locked, Opaque Luggage.

The right to keep one's effects "private and away from prying eyes" may not be eroded merely by the exposure of the outer packaging in which the effects are secreted. In *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), the postal authorities had proper possession of two 12-pound packages declared by the mailer to contain coins, insured at a high value and addressed to two individuals, each under investigation for trafficking in illegal coins. Yet, despite the exposed information which virtually announced what was

[48] The Court's citation to the century-old decision in *Ex parte Jackson* is a reminder that the underlying principle of *Katz* — the refusal to limit the warrant clause to the home — was not a novel development in 1967. As noted, *supra*, at pp. 42-43, the Court in *Ex parte Jackson* had refused to distinguish between "letters and sealed packages" in and out of the home, stating that the Fourth Amendment protection extends to such items "wherever they may be." 96 U.S. at 733.

[49] Obviously, the mere desire, without appropriate action, to maintain the privacy of one's effects will not be sufficient to trigger the protections of the Amendment. If contraband or other illegal goods are left in "plain view" it is well established that such goods may be seized without a warrant — and this is true within a home as well as without. See *Harris* v. *United States*, 331 U.S. 145 (1947).

contained inside the two packages, the inner contents were off-limits until a warrant was secured:

> "The significant Fourth Amendment interest was in the privacy [of the contents] . . .; and that privacy was not disturbed or invaded [by opening the packages] until the approval of the magistrate was obtained." 397 U.S. at 253.[50]

Applying essentially the same principle, the Court in *Katz* rejected the government's argument that the petitioner had surrendered his reasonable expectation of privacy in making telephone calls by allowing himself to be "visible" through the glass portion of the phone booth. Noting that what Katz "sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear," the Court

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[50] The government futilely tries to distinguish *Van Leeuwen* from the case at bar by suggesting that *Van Leeuwen* involved "private communications . . . in a sealed container" (see GB 30-31, n. 18), even though the *Van Leeuwen* packages contained nothing but illegally imported gold coins — and even though there is no indication that the postal authorities ever even had a whisper of a belief that the packages contained letters or other forms of communication.

The *Van Leeuwen* case points up the absurdity of the government's attempt to distinguish between first-class mail, which the government concedes is protected by the Fourth Amendment in or outside the home (GB 30-31, 44, n. 18), and locked luggage which it claims loses its Fourth Amendment protection as soon as it leaves the home. The government suggests that the Fourth Amendment protection for first-class mail derives from the use of the mails to carry private communications which, according to the government's classification scheme, fall within a "core" privacy area. See GB 43-44. But in *Leeuwen* the packages *were* first-class mail and yet they carried illegal goods, *not* private communications. So, too, a locked footlocker may carry private communications despite the absence of first-class postage. The court of appeals was plainly correct when it pointed out that logically, once the warrant requirement were eliminated for baggage searches, there would be no point of rational limitation between such searches and searches of all variety of mail. See Pet. App. 18a.

held that Katz was "surely entitled to assume" that the aspect of his life that he *had* sought to preserve as private — the wagering conversations in which he had engaged — would "not be broadcast to the world." 389 U.S. at 352. "To read the Constitution more narrowly," the Court added, would be "to ignore the vital role that the public telephone has come to play in private communication." *Id.*

Surely, then, at least to the extent that the traveler "seeks to preserve [his personal effects] as private," by containing them in locked luggage, he is "entitled to assume" that he does not, merely by leaving his home, "broadcast" those effects to the world. Under the principle of *Katz* and its progeny, it is clear that whatever protection is available for effects kept or hidden within the locked home — in particular, the protection of advance judicial authorization for a search, absent exigent circumstances — should be equally available for effects kept or hidden within a locked footlocker or similarly secured luggage.

The government never faces this point squarely. Indeed, it ignores entirely the distinction between the *outer* trappings of a container carried outside the home, and the *inner* contents of that container. While carrying luggage in a public area may well eliminate one's reasonable expectation of privacy in the *outer* appearance of that luggage — which may, as it did in *Van Leeuwen* and as it did here, result in the exposure of suspicious outward data — such public carriage does *not* eliminate one's reasonable expectation of privacy in the *contents* of that luggage, especially when that luggage is securely and visibly locked.[51] Thus,

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[51] There are, of course, two exceptions which apply to luggage generally: the contents of luggage may be inspected as a condition to boarding an aircraft (see, *e.g.*, *United States* v. *Albarado*, 495 F. 2d 799 (2d Cir. 1974)), and as a condition to entering the country (see *Carroll* v. *United States*, 267 U.S. 132 (1925)). In both contexts, however, the citizen is on advance notice; the public interest in ensuring safe passage and adherence to immigration and customs laws is great; and the inspections are of a routine, noncriminal, administrative nature in which all luggage passing a particular checkpoint will be searched without an individual determination of probable cause.

even if the government were correct in its assertion that an individual "necessarily accepts" the "risk" that his luggage may be properly seized whenever he transports it outside the home (GB 45), it does not follow that by so accepting a risk of seizure the individual "diminishes his reasonable expectation of privacy" in the inner *contents* of the locked luggage.[52]

Just as Katz did not surrender his right to keep the contents of his telephone conversations private merely by exposing to view the fact that he was placing calls, and just as Van Leeuwen did not surrender his interest in the privacy of the contents of his two packages of coins merely by the fact that packages, with all their suspicious outer circumstances, were properly in the hands of the authorities, so too the individual who transports locked luggage in public does not surrender his reasonable expectation of privacy in the contents of the luggage merely because he carries it outside his home.

Nor does he relinquish his privacy interest, as the government suggests, by entrusting his luggage "to a common carrier with the consequent risk that it will be opened." GB 38. Significantly, the opinion cited by the government to support this "risk" theory, *United States* v. *Bronstein*, 521 F. 2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring), cert. den. 424 U.S. 918 (1976), acknowledges that it is unlawful for a common carrier to open personal luggage without consent. Moreover, whatever instructions may occur in the context of private carriers, such intrusions do not implicate Fourth Amendment concerns since that pro-

[52] As will be discussed below at pp. 53-58, the automobile situation (about which this Court has stated that it sees "no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant," *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970)) is distinctly different from the situation involving securely locked, opaque luggage: even *after* seizure the contents of locked luggage remain "private and away from prying eyes."

vision does not apply to searches by private parties. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). In the last analysis, there are few places, relationships, or activities that are "private" in the sense that other private individuals may not be in a position to disturb, interrupt, or disclose them. A trespasser may gain access to whispered conversations in one's own home; a burglar may enter one's offices and seize items of personal value. Were the Court to declare that such risks diminished the citizen's expectation of privacy sufficiently to allow police-initiated intrusions in all such cases, there would literally be no "reasonable" expectation of privacy left. The ambit of privacy protected by the Fourth Amendment would turn upon the fortuities of daily experience — such as the possibility of accidental breakage and consequent disclosure of the contents of one's personal luggage — and the *Katz* test would self-destruct.[53]

The Far Greater Expectation of Privacy in the Contents of Locked, Opaque Luggage than in the Automobile.

The government seeks to divert attention away from the "practical realization" that in our society there is a "considerable expectation of privacy" involved in placing one's personal effects in securely locked luggage — and that the satisfaction of that expectation has "intrinsic societal importance" because of its connection with the vital role of travel — by focussing on an analogy between luggage and the automobile. But the government's diversionary tactic

[53] The government argues further along the same lines that "express packages and moving freight of all description" should be subject to warrantless searches, because "a substantial portion of the 'freight' that law enforcement officers encounter in transit" contains descriptions of "their contents on the outside of the package both as an advertisement and as an aid in ensuring their proper handling." GB 44. The short answer to this is that the two packages in *Van Leeuwen* also contained an outer description but that did not vitiate the Fourth Amendment privacy interest which continued to inhere in the *contents* until a warrant was obtained. 397 U.S. at 254.

does not work; despite whatever similarities there may be between luggage and the automobile,[54] the *differences* are far greater — and far more relevant to Fourth Amendment concerns. Indeed, this Court has already contrasted the diminished privacy interest that attaches to an automobile with the expectation of privacy in a container used to keep one's belongings. Only two Terms ago this Court noted:

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and *it seldom serves as one's residence or as the repository of personal effects*. . . . It travels public thoroughfares where both its occupants and *its contents are in plain view*." *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (emphasis added).[55]

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[54] As the government points out (GB 39), the First Circuit noted one such similarity between "baggage or goods in transit" and automobiles:

> "Unless immobilized, such items may disappear before a warrant is obtained, and immobilization (a step which most courts, including ourselves, will permit, given cause), is arguably just as annoying to the owner as a search." (Pet. App. 17a.)

However, as discussed in the text, because there is indeed a far greater expectation of privacy in the *contents* of locked luggage than in an automobile — a factor the First Circuit did *not* take into account — an entry into and search of locked luggage, unlike an inspection of the inside of an automobile, *is* a far greater invasion of privacy than is its mere immobilization.

[55] It should be noted that despite the "lesser expectation of privacy" which is said to attach to automobiles, this Court has expressly recognized that "a search, even of an automobile, is a substantial invasion of privacy." *United States* v. *Ortiz*, 422 U.S. 891, 896 (1975).

See *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3096. Luggage, unlike the automobile, is precisely intended to be a "*repository of personal effects*"; and although luggage may "travel" in the sense that others transport or move it on public thoroughfares, rarely if ever are its contents intentionally exposed to "plain view." In sharp contrast, the interior of the automobile is continually exposed to public eyes. Here, of course, the luggage at issue was opaque and securely locked, and was never observed open by the government agents before the warrantless search.[56]

Moreover, the essential *differences* between automobiles and luggage were underscored by Mr. Chief Justice Burger last Term when he explained the basis for the lesser expectation of privacy in an automobile than in one's home or office:

> "In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 442. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order. . . .

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[56] Although in *Opperman* the glove compartment was opened by the police, the Court was careful to point out that it had been unlocked (96 S. Ct. at 3100, n. 10) and that the glove compartment "is a customary place for documents of ownership and registration" (*id.*, at 3098). Moreover, "the trunk had not been searched in [*Opperman*] *because it was locked.*" ____ U.S. at ____, 96 S. Ct. at 3102, n. 6 (Powell, J., concurring) (emphasis added).

"In the interests of public safety and as part of what the Court has called 'community caretaking functions,' *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 441, automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." *Opperman*, *supra*, ____ U.S. at ____, 96 S. Ct. at 3096.

Luggage, unlike the automobile, is not "subject to pervasiv and continuing regulation and controls, including periodic inspection and licensing requirements." Nor is it an "everyday occurrence . . . [for] police [to] stop and examine" luggage for "violations" of one sort or another and pieces of luggage are not "frequently taken into police custody" for "public safety" or "community caretaking" purposes.[57]

[57] Admittedly, luggage carried by a traveler boarding an airplane or crossing an international border is typically subject to inspection. However, such intrusions into the traveler's privacy are justified in those particular settings on the basis of vital national and safety interests. In settings in which those interests are not operative the traveler's expectation of privacy in his luggage is not diminished. Nor is the individual's expectation of privacy from *governmental* intrusion reduced because he may on occasion entrust his baggage to a common carrier with the "risk" that it may be opened. As discussed above at pp. 52-53, that "risk" does not change the individual's relationship to the government any more than a homeowner's expectation of privacy in his home is reduced because he "risks" burglary.

With the automobile, on the other hand, the possibility of police inspection exists at *all* times — except perhaps when the vehicle is parked on private property (see *Coolidge* v. *New Hampshire*, 403 U.S. at 463, n. 20) and the inside of the automobile is always exposed to public view — so that there is rarely a time when the individual can reasonably expect privacy with respect to his car.

Nor, moreover, does the fact that luggage may be comparable to the automobile in so far as it is "*easily movable*" (see GB 38) make it comparable to the automobile with respect to the expectation of *privacy*. As the government concedes, although the mobility inherent in an automobile "may frequently excuse the warrantless *seizure* of a car under the 'emergency' exception to the warrant requirement, [that mobility] is analytically *an insufficient justification* for the subsequent *search* of the car without prior judicial approval." GB 35 (emphasis on "seizure" and "search" in original). The government notes quite clearly that the justification for the search without a warrant rests squarely — and solely — on the "lesser expectation of privacy" in the automobile — a quality analytically distinct from its mobility. See GB 35-36, citing *Opperman*, *supra*, and *Cardwell* v. *Lewis*, *supra*. Thus, although the movability of luggage may, under certain circumstances, justify its detention until a warrant can be obtained (as occurred in *Van Leeuwen*), the mere fact that luggage *is* movable cannot, and does not, reduce the individual's expectation of privacy in its *contents*.

Finally, the fact of detention itself, should it occur, does not, contrary to the government's claim (GB 38-40, 48-49), change the individual's right to "preserve as private" the inner *contents* of his locked baggage. In *Van Leeuwen*, the Court specifically recognized that the "significant Fourth Amendment interest" was the privacy of the contents of the sealed packages, *after* their seizure — and detention for *29 hours* did not change that constitutional

fact. 397 U.S. at 254. Similarly, the procedure of sealing off an area until a warrant can be obtained has never been thought so to reduce the privacy interest involved as to render the warrant superfluous. See *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 461, n. 18 (unconstitutional search because automobile could have been guarded); *United States* v. *Jeffers*, 342 U.S. 48 (1951) (unconstitutional search because door to room could have been guarded).

Yet despite these precedents the government argues that once a "footlocker or suitcase . . . has been validly seized," the owner's expectation of privacy in its contents is so far diminished that a warrant is no longer required. GB 38-39. The fallacy of this argument is that it relies solely on the rationale of the "automobile search" exception — an exception, which, as noted above, finds its primary justification in the fact that automobiles are, in the first instance, less deserving of privacy protection than are homes or containers for personal belongings. Thus, while it may be that in the case of an automobile, once a seizure has occurred, "calculations of 'greater' or 'lesser' intrusions will not be demanded" (GB 39, citing *Chambers* v. *Maroney*, *supra*), and either course — immediate search or detention until a warrant can be obtained — will be permissible, in the case of *locked luggage*, which is far more deserving of privacy protection, only the warrant course is permissible.[58]

[58] The government's suggestion that immediate search should be sanctioned because it "may vindicate the owner" whose luggage contains nothing incriminating (GB 39, n. 26) misses the point. Any owner who *wishes* to "vindicate" himself and consent to a search may be allowed to do so. But to *allow* a consent search is a far cry from authorizing the law enforcement agent to conduct a search against the owner's will. See *United States* v. *Bronstein*, *supra*, cited by the government, in which the federal agents gave the defendants the choice of consenting to search of their baggage or being detained while the agents prepared an affidavit and secured a search warrant.

3. Excluding All Personal Effects Outside The Home From The Warrant Requirement Conflicts With The Reasonable Expectations Of Privacy And Fundamental Right to Travel Vital To Modern Society, Without Serving Any Legitimate Law Enforcement Interest Or Other Public Need.

Reduced to their essentials, the government's principal arguments for dispensing with the warrant as a prerequisite to conducting probable cause searches of luggage found outside the home rest upon nothing more than an unreasonable invocation of the "Framers' intent" and an inaccurate analogy to the automobile. The government claims no foundation for its proposed new rule in any important interest of those who enforce the law or of society in general.

Nor can any constitutional purpose be served by ignoring the realities and practical expectations of privacy of modern society and imposing on today's highly mobile society an obsolete intent which arose, if at all, in an age which disparaged mobility — and which will necessarily inhibit the exercise of the right to travel. See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Such an inhibition is indeed woven into the very fabric of the government's formulation. Recognizing that the individual *might* not wish to subject his chattel to warrantless search — but insisting that he "necessarily accepts" the "risk" of seizure (and, therefore, under the government's view, of search) "when he transports the chattel in public" (GB 45) — the government suggests that the individual can avoid that "risk" and preserve the privacy of his effects by exercising "control over both the kinds of belongings that he subjects to search in public and the frequency with which the police will encounter them." *Id.* In other words, according to the government, a person may preserve his privacy but only if he stays at home, or travels empty-handed: the individual must, under the government's view, *choose* between his constitutional right to privacy and his constitutional right to

travel; he may preserve one only by forfeiting the other.[59] However, while the inhibiting effects of the power the government seeks may be justified in the contexts of airport or border searches where compelling national interests are at stake and people are aware of the likelihood they will be routinely observed, they are clearly *not* costs which should be exacted in the total absence of evidence indicating that such broad-ranging, unrestrained authority is essential to the effective enforcement of vital laws.[60]

Nor is the government correct that because "the officer may eventually have to demonstrate [the "satisfaction" of the probable cause requirement] in court" (GB 44-45; see 55-56) no benefit of the warrant requirement would be lost if luggage searches were freely allowed in the first instance on the basis of the searching officer's on-the-spot determination of probable cause. Post-search review is simply not — contrary to the government's suggestion — an adequate substitute for the advance exercise of a detached judicial judgment. Such review plainly cannot operate as "the independent check upon executive discretion" which is "the time-tested means of effectuating Fourth Amendment

[59] Moreover, it cannot be overlooked that the imposition of the warrantless rule sought by the government would fall most harshly on those members of our society who are "vagabonds" or wanderers and have no fixed dwellings within which to store their belongings. Cf. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972) (suggesting that ordinances aimed at "vagabonds" raise serious questions of equal protection).

[60] The government's suggestion that the power it seeks would not be unrestrained because "[t]he scope of the search [would be] necessarily limited by the size and contours of a relatively small container and by the number of items that can be enclosed therein" (GB 45) is absurd. The rule proposed by the government would, if adopted, apply not only to the single footlocker which was seized in the case at bar, but would also apply to seizures of multiple pieces of luggage and to containers of all sizes — including those which do indeed contain *all* of a person's possessions.

rights." *United States* v. *United States District Court*, *supra*, 407 U.S. at 318-319. This Court has stated that:

> "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948).

Nor can a post-hoc review — after the search may have indeed uncovered incriminating evidence — "prevent hindsight from affecting the evaluation of the reasonableness of [the] search," at the time it occurred. *Opperman*, ____ U.S. at ____, 96 S. Ct. at 3103 (Powell, J., concurring). See *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964).[61]

More fundamentally, the fact that "the officer may eventually have to demonstrate" probable cause in a later court proceeding as part of the criminal process does not assist the innocent citizen whose privacy is invaded by an "over-zealous" officer but who is released without further proceedings because the search uncovered no evidence of crime. The government's suggestion that the innocent citizen would be adequately protected because "an officer who acts without probable cause may be forced to answer in damages" (GB 45, n. 32) misses the point of the Amendment entirely. As the Court noted in *Chimel* v. *California*, 395 U.S. 752, 766, 767, n. 12 (1969), the Amendment is a positive restraint on government activity, "designed to

[61] Recognizing this danger, courts do, as the government itself concedes, give "greater deference . . . to findings of probable cause when a warrant has been obtained." (GB 15, citing *United States* v. *Ventresca*, 380 U.S. 102, 106 (1965); *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964). Consequently, swearing out a warrant in advance will minimize later court challenges to the legality of police conduct and will thus reduce the diversion of official resources and the clog in the criminal courts.

prevent, not simply redress," unwarranted invasions of privacy; its purpose is not to compensate victims after the fact for the harms they suffer at the hands of unrestrained government agents.[62]

II. Neither The Agents' Belief That Contraband Will Be Found Nor The Fact Of An Arrest Can Justify Eliminating The Fourth Amendment Warrant Requirement For Searches Of Locked Luggage Outside The Immediate Control Of The Arrestee And Not Conducted Contemporaneously With The Arrest.

The government presents a second argument, entitled "Even If The Court Were To Adopt a Presumptive Rule in Favor of Warrants, The Search of the Footlocker Was Reasonable." GB 46.[63] On its face, this argument would appear to assume the application of the presumptive warrant requirement to the footlocker search in this case and to require the government to try to demonstrate that the "exigencies of the situation made [the failure to seek a warrant] imperative." See *Coolidge* v. *New Hampshire*,

[62] The government's suggestion — to impose the burden of civil lawsuit on the innocent citizen — is not only an inadequate method to effectuate the purposes of the Fourth Amendment, it is also an entirely unrealistic solution. The high cost in time and money involved in bringing such actions (and the difficulty of winning damages, particularly in light of the good faith defense available to public officials; see, *e.g.*, *Pierson* v. *Ray*, 386 U.S. 547 (1967)) will certainly deter the average innocent citizen from taking that course.

[63] In what must have been an oversight, the government poses this alternative to the Court in obverse fashion, *as if there had never been a presumptive warrant requirement* all these years, and the choice now facing the Court were whether "to *adopt*" one. Actually, the choice facing the Court is whether to *reverse* the last century of Fourth Amendment law and *overrule* the presumptive warrant requirement for searches of personal property outside the home.

403 U.S. 443, 454-455 (1971). The government does not, however, here, or anywhere else, make any such effort.[64] What the government does instead is to propose that "two additional factors" — "[1] the agents' belief that the footlocker contained contraband and [2] the respondents' arrest at time of the seizure" — "*contribute to the lawfulness* of the warrantless search of the footlocker." GB 46 (emphasis added). Implicit in this formulation is the notion that these two factors, either alone or in combination, excused the agents' failure to seek a warrant — not because these factors made it difficult or even *inconvenient* for the agents to do so, but simply because these factors rendered a warrant unnecessary in the first place. Analytically, this argument is not only question-begging; it is no more than an extension of the government's primary argument: while in the first portion of its brief the government relies on its interpretation of the Framers' intent and an analogy with the automobile to justify the exclusion of baggage searches from the warrant clause, in this section the government relies on the factors of probable cause and the arrest to support the same conclusion. However, as the analysis below will demonstrate, neither the factor of probable cause, which the government considers independently (GB 47-49), nor the factors of probable cause and the arrest considered in combination (GB 49-57), provide any justification for excluding baggage searches from the presumptive warrant requirement.

[64] Indeed, as has been pointed out above, at p. 22, n. 13, the government has at no time during the entire course of this litigation ever even argued that an exigent circumstance compelled the agents to neglect the warrant requirement.

A. *Hindsight Determination Of The Contraband Contents Of Securely Locked, Opaque Luggage Cannot Justify Abdication Of The Judicial Warrant Function To The Law Enforcement Officer In The Field.*

The government argues in essence that the fact of probable cause, always considered a necessary prerequisite for *obtaining* a warrant, is at the same time a sufficient basis for *dispensing* with one. The government reaches this absurd conclusion by two separate routes, neither supported by reason.

Initially, the government argues that, given probable cause to believe that the footlocker contained contraband, it was reasonable for the agents to conduct a warrantless search because "a person can have no reasonable expectation of privacy in contraband goods." GB 47.[65] The unstated major premise to this argument is the assumption that the agents are always right — for otherwise, if the agents were wrong, and the footlocker did *not* in fact contain contraband, then the "person" *would* have had a "reasonable expectation of privacy" and the agents would

[65] The government premises this argument on the assertion that "[t]he agents had probable cause to believe that the footlocker contained *not* personal belongings or papers, but contraband" (GB 47; emphasis added). However, this assertion is entirely unsupported by the record. While the three facts cited by the government — the footlocker's "unusual weight for its size," the detector dog's positive reaction and the "leaking talcum powder" (GB 47, n. 33) — may support a belief that *some* marijuana (and some loose talcum powder) was contained in the 200-pound footlocker, these facts do *not* support a belief that the footlocker did *not* contain "personal belongings or papers." For all the agents knew or could have reasonably believed, the footlocker contained one pound of marijuana, one pound of loose talcum powder and approximately 198 pounds of personal papers and books. But, in any event, as fully set out in the text above, whether or not the agents had probable cause to believe that the footlocker contained one pound or 200 pounds of marijuana, they did not, by virtue of probable cause alone, have the right to dispense with the warrant requirement.

have acted *un*reasonably in failing to secure a warrant. A key function of the warrant requirement is, of course, to minimize the number of false positives, *i.e.*, the number of instances in which the "overzealous" law enforcement officer is *mistaken* in his assessment of probable cause. The more often the warrant requirement is eliminated, allowing the searching officer's individual field judgment to go unchecked, the more often searches will be made without probable cause. The government here asks this Court to eliminate the warrant requirement — and thereby increase the likelihood of false positives — *whenever* the agents have probable cause to believe that a piece of baggage contains contraband. But in deciding how often law enforcement officers should be allowed to be wrong, it cannot be assumed, as the government does here, that they will always be right.

Reliance on this assumption not only runs counter to the purposes of the warrant clause; it also camouflages a fallacious reasoning process. To argue, as the government does here, that the decision of the agents in this case not to seek a warrant was reasonable because the respondents had "no reasonable expectation of privacy" in the contents of the footlocker is to engage in a two-fold fallacy. First, it takes the *end results* of the search procedure — *i.e.*, the discovery of the marijuana in the footlocker — and uses those end results to justify, by hindsight, the decision which the agents made *at the inception* of the search procedure, namely, to proceed to unlock the footlocker without even bothering to seek a warrant. Second, it takes the *respondents'* knowledge that the footlocker contained marijuana, and (treating that knowledge as voiding the respondents' "expectation of privacy" in the contents) imputes that knowledge to the *agents retroactively*, to the time before the search commenced when the agents could *not* have known what was in the minds of the respondents — and indeed could have been entirely mistaken about the contents of the footlocker.

In effect, the government argues that if, prior to a search of his baggage, a citizen knows that the baggage contains marijuana, then the searching officer — who does *not* know what is in the baggage — is free to search the baggage without a warrant; or, phrased alternatively, if, as the result of a baggage search, marijuana is uncovered, then — no matter what the searching officer does know or believe in advance — the search will be deemed "reasonable" because it will be known then, after the fact, that the person had "no reasonable expectation of privacy" in the contents. Such a rule would send the Fourth Amendment to its grave: it has never been thought that the concept of "reasonable expectation of privacy" applies only when it later turns out that the search failed to uncover evidence of crime or contraband; or that "reasonableness" means that a warrant is only required when it later turns out that the searching officer was *incorrect* in his belief that contraband would be found. Surely the respondents here had no lesser "reasonable expectation of privacy" in the contents of their locked footlocker than Katz had in the contents of his telephone conversations, or than Van Leeuwen had in the contents of his two 12-pound sealed packages.[66] Yet in those cases the Fourth Amendment required a warrant before a probable cause search could be made.

[66] In its fervor to limit the plain impact of *Katz* and its progeny, the government focuses on the *type* of illegal contents contained in the footlocker here. But there is no rational distinction between the "reasonable expectation of privacy" the individual has when he transports illegally imported goods or when he transports marijuana — or, for that matter, when he engages in a thoroughly illegal conversation for which he knows he could be prosecuted and sent to prison. Indeed, despite its disclaimer (GB 47), the government's focus on the "contraband" nature of the contents involved here does resurrect the distinction between different categories of evidence put to rest by *Warden* v. *Hayden*, 387 U.S. 294 (1967). Nor is the government's claim that "a person can have no reasonable expectation of privacy in contraband goods" aided by its reference at GB 47 to the early statutes, cited by the Court in *Carroll* v. *United States*, 267 U.S. 132 (1925). Those statutes, as discussed above at pp. 36-39, do no more than regulate the searching power of customs agents; they do not eliminate Fourth Amendment protections from

The second argument offered by the government in connection with the contraband contents of the footlocker is equally fallacious. The government asserts that "since the presence of the contraband subjected the footlocker to a warrantless seizure and forfeiture, it was reasonable for the agents to conduct a search of the chattel in their lawful possession" without a warrant. GB 48. There are two ways to interpret this contention.

On the one hand, the government may mean that, because the agents had possession of marijuana, the fact that marijuana is subject to forfeiture allowed the agents to conduct a search of the footlocker freely, without a warrant. But this argument again reasons backwards from the results of the search: the *decision* to search cannot be justified by the discovery, as a result of the search, that marijuana was present.

On the other hand, the government may mean that because the agents could lawfully seize the locked footlocker without a warrant — on the basis of probable cause to believe it contained marijuana[67] — they could also lawfully search it without a warrant. This argument depends on the same assumption that the government advances as part of its earlier effort to analogize luggage with the automobile — namely, the assumption that the intrusion involved in searching the contents of locked luggage is no greater than the intrusion involved in detaining that luggage until a warrant can be obtained. As fully discussed at pp. 53-58, however, this assumption is based on a false equation between baggage and the automobile; while both may be movable and therefore properly *seizable*

situations, such as the one here, in which no international border is crossed and no exigent circumstance requires dispensing with the warrant requirement.

[67] The forfeiture statute, 21 U.S.C. § 881, cited by the government, specifically authorizes such a seizure but, as will be noted below at n. 68, it does not offer any further assistance to the government's position here.

without a warrant, the justification for *searching* the automobile, once seized, is — as the government itself specifically concedes (GB 35) — the lesser expectation of privacy in the automobile because of its peculiar exposure to police inspection and intervention, in routine administrative settings, and its peculiar design which exposes its interior to public eyes. Under the principles of *Katz* and *Van Leeuwen*, the expectation of privacy protected by the Fourth Amendment does not evaporate upon the seizure of a sealed container, or upon observation of its outer manifestations, but rather endures until the government penetrates the contents. Accordingly, the fact that the agents may have properly seized the securely locked, opaque footlocker without a warrant does not mean that they could proceed to search it without taking any steps to obtain the dispassionate approval of a neutral and detached magistrate.[68]

[68] The government's citations to the forfeiture statute and to *Cooper* v. *California*, 386 U.S. 58 (1967) (at GB 48-49), add nothing to its argument. All that the relevant provisions of the statute could authorize in a case such as this would be the seizure of a container believed to contain a controlled substance (21 U.S.C. § 881(a)(3) and (b)(4)) and — once the container were lawfully opened (by some authority *not* given in the statute) and marijuana were found inside — seizure of the marijuana (21 U.S.C. § 881(f)). As the court of appeals found, while the statute may have "reinforce[d] the agents' power to detain" the footlocker, nothing in the statute gave the agents "any greater authority to search than would exist under normal Fourth Amendment principles" (Pet. App. 19a, n. 9).

Cooper, as interpreted by this Court in *Cady* v. *Dombrowski*, 413 U.S. 433, 447 (1973), and most recently in *Opperman* ___ U.S. ___, 96 S.Ct. 3092 (1976), at 3098, stands for no more than the proposition that, once properly within police custody, an automobile (which has a lesser expectation of privacy to begin with) can be searched without a warrant "to guarantee the safety of the custodians." *Cady*, 413 U.S. at 447. Moreover, the Court in *Opperman* specifically noted that the holding of *Cooper* does not depend on the possibility of forfeiture proceedings.

B. *In the Absence of Exception or Exigency, the Mere Fact of Arrest Cannot Justify Dispensing with the Warrant Requirement for Non-Contemporaneous Searches of Personal Property Outside the Immediate Control of the Arrestee.*

Logically, the most natural argument for the government to have raised in support of the agents' right to search the footlocker without a warrant would have been the established search-incident-to-arrest exception, articulated in *Chimel* v. *California*, 395 U.S. 752 (1969). Indeed, the government *did* present this argument to both courts below and the court of appeals specifically noted that it knew of "no decision of the Supreme Court . . . more relevant [than *Chimel*] to the arrest [and warrantless search] situation here" (Pet. App. 12a). However, as the record makes clear, both lower courts, applying the principle of *Chimel*, found, *on the facts*, that the footlocker was not "'within [respondent's] immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.*, at 763[69] (Pet. App. 15a, 56a).

[69] This finding is supported by at least the following facts (set out at pp. 4-6, *supra*): (1) when the arrest took place "there were numerous officers present including city policemen, railroad guards and federal agents"; (2) the arrest occurred *after* the 200-pound padlocked footlocker had already been deposited in the trunk of the parked automobile; (3) the footlocker "was far from portable, and too heavy even to be carried by the average person . . . [and] was tightly secured [with a "double locking system" (A. 41)] and could not be opened" (Pet. App. 15a); (4) when the arrest took place the automobile engine was not running and no accomplices were suspected or believed to be in the area; (5) within "less than 30" seconds after the arrest, the respondents were "frisked . . . put up against the car" and then handcuffed and immediately placed inside two government vehicles; (6) immediately after the arrest, the keys which opened the footlocker were seized from Machado's person; and (7) the government concedes that, from the moment of the arrest, the footlocker was under the agents' "control at

The government, aware that it cannot secure reversal of lower court opinions based solidly on findings of fact,[70] does not dispute the determination that the footlocker was indeed outside the "immediate control" of the respondents and that the warrantless search therefore cannot be justified under *Chimel*. Rather, it claims, as its final argument, that *Chimel* should not have been applied in the first place because the standard of "immediate control" has "little relevance" to this case. GB 14. In lieu of *Chimel*, the government offers a different — more "flexible" — standard which would allow the search of *any* "property *in the possession*" (but outside the "immediate control") of a person arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime. GB 51; see GB 53 (emphasis added).

In support of this standard the government argues that when a search following an arrest depends for its justification, not on the need to protect or preserve evidence, but instead on a "wholly different justification — probable cause to believe that evidence of crime will be found —" (GB 53), there is no need "to limit the search solely to those areas within the arrestee's immediate control." GB 54. And, the government explains, in such circumstances, when "the search is designed to uncover evidence that there is a strong reason to believe will be found," the specific justification of probable cause "provides a built-in limitation on the places and things that may be searched." *Id.*

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all times"; (8) there was no threat of danger from the contents of the footlocker; (9) the search was conducted an hour and a half after the arrest, in the federal building, a short distance from the federal courthouse; and (10) there was no evidence that it would have been impracticable, or even inconvenient, to obtain a warrant before conducting the search.

[70] The government explains its decision not to seek certiorari to review the lower court rulings that Chadwick's arrest lacked probable cause and that his post-arrest statements were illegally obtained on the basis that these questions "appear to involve the application of settled principles to particular facts." GB 5, n. 2.

The most striking aspect of this argument is that it is not new: it is virtually the same theory which undergirded the decision in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), overruled by this Court in *Chimel*, *supra*, 395 U.S. at 768. In *Rabinowitz*, the warrantless search followed immediately upon the arrest of a stamp dealer on charges relating to sale of forged stamps. The arrest took place in the dealer's one-room office — the very office from which an informant had purchased forged stamps just a few days before; and at the time of the arrest "the officers had reliable information that . . . [the dealer] probably possessed several thousand . . . [forged] stamps." 339 U.S. at 58. Although the officers had neglected to secure a search warrant, the Court never questioned that they would have been able to do so. See 339 U.S. at 59. In upholding the search, the *Rabinowitz* Court emphasized — just as the government does here — that the search was directed specifically at a specific and limited place, and was (to use the government's words here) "designed to uncover evidence that there [was] a strong reason to believe [would] be found." See GB 54. The Court stated:

> "Specificity was the mark of the search and seizure here. There was probable cause to believe that respondent was conducting his business illegally. The search was for stamps overprinted illegally, which were thought upon the most reliable information to be in the possession of and concealed by respondent in the very room where he was arrested, over which room he had immediate control and in which he had been selling such stamps unlawfully." 339 U.S. at 62-63.

Under these facts the Court held in *Rabinowitz* that the agents had the right, without a search warrant, to conduct a search contemporaneously with an arrest "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed." 339 U.S. at 61.

If *Rabinowitz* were the law today, the government's theory — permitting a warrantless search "designed to uncover evidence . . ." following an arrest — would find support in that case;[71] but this Court reversed *Rabinowitz* faced with the same theory presented by the government here.

The government tries to camouflage the fact that its theory, if adopted, would resurrect *Rabinowitz pro tanto* by characterizing *Chimel* — which overruled *Rabinowitz* — as a case directed solely against "searches not justified by probable cause" and which "bore no intrinsic relationship to the underlying arrest." GB 52. But this is a stark mischaracterization of *Chimel*. There *was* probable cause to conduct the search of Chimel's home: indeed, that fact is one of the points emphasized by Mr. Justice White in his

[71] Even under *Rabinowitz*, however, the search of the footlocker in this case would have required a warrant. *Rabinowitz* validated a *contemporaneous* search — one which occurred immediately upon the arrest of the dealer. As Mr. Justice White emphasized in his dissent in *Chimel*, the principle of allowing a search for evidence contemporaneously with an arrest assumes that

> "where it is practicable to obtain a search warrant and the search is not contemporaneous with an arrest, a warrant *must* be obtained to validate the search. This is the holding of past cases and I do not question it." 395 U.S. at 776, n. 8 (emphasis added).

Here, the search was not contemporaneous; it occurred an hour and a half after the arrest at South Station. Moreover, the government has never disputed that it would have been "practicable to obtain a search warrant." Indeed, in light of the complete security with which the footlocker and the respondents were held, the absence of any threat of danger from the contents, the apparent ease with which a warrant could have been obtained (see Pet. App. 50a) — and the failure of the government to offer any evidence refuting the practicability of obtaining a warrant — it must be assumed, for purposes of deciding this case, that it was, in fact, "practicable to obtain a search warrant." Therefore, even when measured against the contemporaneous search standard of *Rabinowitz*, the warrantless search of the footlocker in this case was invalid.

dissenting opinion. See 395 U.S. at 774-775.[72] Thus, when the Court made its decision in *Chimel*, it had before it a situation closely analogous to the one here, in which there was probable cause *both* to arrest *and* to search; and when it ruled that that search, and the previous search in *Rabinowitz*, were invalid, it did so *not* because there was no probable cause to search but because there was no *warrant* to conduct that search.

Nor can the government validly suggest that the "immediate control" test of *Chimel* should not be applied to this case because the search in *Chimel* took place in a house. The Court in *Chimel* certainly did not conceive of its analysis as limited to the interior of home or office. On the contrary, in considering the "proper extent" of the "search incident to arrest" exception, the Court specifically drew on the principles of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Sibron* v. *New York*, 392 U.S. 40 (1968) — both cases which involved confrontations between police officers and individuals *on the street*. And, more recently, in *United States* v. *Robinson*, 414 U.S. 218 (1973), at 225-226, the Court explicitly approved *Chimel* without so much as even suggesting that its concepts should be limited to the indoors.[73] See also *United States* v. *Rothman*, 492 F. 2d 1260, 1268 (9th Cir. 1973), in which the Court applied a *Chimel* analysis to a luggage search at an airport.

[72] As noted above, n. 71, although Mr. Justice White argued for upholding the warrantless search in *Chimel* as valid, incident to arrest, he specifically distinguished the kind of situation involved in this case, in which it was "practicable to obtain a search warrant" and "the search was [not] contemporaneous with [the] arrest."

[73] The only rationale the government offers for a distinction between indoor and outdoor searches is a vague allusion to a greater "historical or policy justification for a presumptive warrant requirement" in connection with the home. GB 55. As fully discussed previously however, there is neither a valid historical basis nor any policy justification for excluding personal property outside the boundaries of the "home" from full Fourth Amendment protection.

The final argument offered by the government in support of its claim that a more "flexible" standard should replace the "immediate control" test of *Chimel* is equally unavailing. Relying on *United States* v. *Robinson*, 414 U.S. 218 (1973), and *United States* v. *Edwards*, 415 U.S. 800 (1974), the government asserts that "a probable cause search of a person's belongings following his arrest in a public place is reasonable, whether or not those belongings may have been within his immediate control, because of the greatly diminished expectation of privacy following an arrest." GB 56. But *Robinson* and *Edwards* did no more than explore the parameters of the "*person* search" — the first aspect of the *Chimel* exception[74] — in light of Fourth Amendment principles. Concluding that the Fourth Amendment does permit a "full search" of the body of the arrestee (*Robinson*, 414 U.S. at 237-238 (Powell, J., concurring)), and of the "personal effects" in his "*immediate* possession" upon arrest (*Edwards*, 415 U.S. at 804-805 (emphasis added)), the Court refused to suppress cigarettes removed from the pockets of the arrestee (in *Robinson*) and clothing worn by the arrestee (in *Edwards*). But the Court did not suggest that the individual's expectation of privacy in belongings *not* on his person were in any way undermined or even implicated by its decision, or that it would be "reasonable" under the Fourth Amendment to search through *all* belongings in any way associated with or in the "possession" of the arrestee, even though not upon his person or within his "immediate possession" or within his "immediate control" at the time of arrest.

The government's essential argument here — namely, that the diminution in the expectation of privacy which an arrestee necessarily suffers in connection with his *person* justifies expanding the search to include belongings within

[74]In *Robinson*, 414 U.S. at 224, the Court, noting that *Chimel* includes "two propositions" — "that a search may be made of the *person* of the arrestee," and "that a search may be made of *the area within the control* of the arrestee" — restricted its discussion entirely to the first.

his general possession or general vicinity at the time of his arrest — is premised on the same false reasoning the government uses in connection with its argument that the seizure of a sealed container automatically wipes out the individual's expectation of privacy in its contents. Basically, at every juncture the government treats the Fourth Amendment right to privacy as a seamless web and insists that the cutting of a single strand unravels the whole. However, as fully discussed above at pp. 57-58, the intrusion involved in seizing locked luggage and detaining it while a warrant is sought does *not* eliminate the individual's Fourth Amendment right to privacy in its concealed contents.

So too here, the intrusion of an arrest does not automatically destroy the individual's Fourth Amendment right to privacy in all of the "property in his possession" (but concededly beyond his "immediate control"). In fact, in *Chimel*, the Court rejected the precise argument raised by the government here. Mr. Justice White argued in dissent that the scope of the search-incident exception should not be limited to the area strictly within the arrestee's "immediate control" because "once an arrest has been made, the additional invasion of privacy stemming from the accompanying search is 'relatively minor.'" 395 U.S. at 766, n. 12.[75] The Court's answer in *Chimel* is dispositive here:

> ". . . we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." *Id.*, at 767.

[75]Even in making this argument, Mr. Justice White indicated (as noted above, p. 72, n. 71) that the additional invasion of privacy involved in an "accompanying search" would not be tolerated without a warrant if the search was non-contemporaneous and a warrant practicable to obtain (395 U.S. at 776, n. 8) — two conditions which are indisputably met here.

Specifically declining to find that one intrusion justifies another, the Court held:

> "No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items." 395 U.S. at 766.[76]

The government has offered absolutely no reason to overrule this holding, reverse *Chimel* and go back to the discredited *Rabinowitz* standard.

In an apparent effort to make its proposal for a "flexible" standard more palatable — if not supported by reason — the government argues that an arrest provides "safeguards that justify dispensing with the need for *prior* resort to a magistrate" (GB 55, emphasis added) because the arrest ensures that a later judicial review will be held.[77] The short answer to this was given by the Court in *Chimel*:

[76] The Court did not, in *Robinson* or *Edwards*, impeach in the slightest this central principal of *Chimel*. Indeed, the Court specifically reconfirmed that "[t]he *justification* or reason for the *authority to search* incident to a lawful arrest rests . . . *on the need to disarm the suspect* in order to take him into custody . . . [and] on *the need to preserve evidence* on his person for later use at trial." *Robinson*, 414 U.S. at 234 (emphasis added). The Court's conclusion that the government need not prove "the probability in a particular arrest situation that weapons or evidence would in fact be found" in order to justify a warrantless search in that situation (*Robinson*, 414 U.S. at 235), means only that a *Chimel* search will be upheld, if within the permissible bounds, regardless of whether the arresting officer actually experiences a subjective fear or belief that the arrestee is armed or that evidence is about to be destroyed.

[77] In its primary argument the government attempts to rely on this same argument to support its claim that *probable cause alone* is sufficient protection for Fourth Amendment rights because the search officer "may eventually have to demonstrate ["satisfaction" of this requirement] in court." GB 45. This argument fails there (see pp. 60-62) as it fails here.

> "[O]ne may initially question whether all of the States in fact provide the speedy suppression procedures the dissent assumes. More fundamentally, however, we cannot accept the view that Fourth Amendment interests are vindicated so long as 'the rights of the criminal' are 'protect[ed] . . . against introduction of evidence seized without probable cause.'" 395 U.S. at 767, n. 12.

As fully discussed above at pp. 60-62 exclusive reliance on post-search review seriously undermines, if it does not destroy, the prophylactic aspects of the Fourth Amendment. Without the *advance* interposition of a neutral decision maker, there is an increased risk of improperly exercised discretion, hindsight coloration of the facts and untold numbers of fruitless searches which will never be scrutinized by the judiciary.[78]

Conclusion.

In seeking reversal of both lower court decisions invalidating the warrantless search of the locked footlocker, the government offers no evidence or argument of exigency or law enforcement need to justify such a result. Indeed, the government barely deals with the facts of the case and implicitly concedes that it cannot prevail on these facts

[78] Nor does the government's suggestion that searches incident to arrest may be *preferable* to "warrantless searches not accompanying an arrest" which are "not promptly accounted for to a judicial officer" (GB 55) provide a sufficient justification for eliminating the warrant requirement whenever an arrest occurs. That the individual's Fourth Amendment rights may be *more* protected when the warrantless search of his belongings occurs incidental to his arrest than when the search occurs without his arrest (and perhaps without his even knowing that it has occurred) does not mean that his important Fourth Amendment rights would not be more adequately protected still if the search were done pursuant to the requirements of the warrant clause.

without overturning existing precedent. Accordingly, it calls upon this Court to authorize a broad new expansion of the searching power which would relieve the agents in this case of their warrant obligations. Under the government's proposed rule, a warrant would no longer be required for probable cause searches except for those occurring within the home or office or involving private communications via telephone or first-class mail. No reason offered by the government, however, justifies the drastic, gratuitous change in Fourth Amendment law it seeks, and neither history nor decisional law support its claims. On the contrary, the principles of *Katz* and its progeny, and this Court's clear commitment to maintaining the warrant requirement for all probable cause searches in the criminal context in order to protect "the individual's legitimate expectation of privacy against the overzealous police officer," plainly mandate that the lower court opinions be upheld.

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